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In The Supreme Court of the United States

GEORGE DOE, INDIVIDUALLY AND AS GUARDIAN AD LITEM; LACEY DOE, A MINOR,

Petitioners,

V.

BETSEY WARREN LEBBOS; LISVET CARRILLO-HERRERA; COUNTY OF SANTA CLARA; SANTA CLARA COUNTY DEPARTMENT OF SOCIAL SERVICES; SANTA CLARA COUNTY CHILD PROTECTIVE SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a social worker employee of a child protection services agency ever entitled to absolute immunity in the investigation and pursuit of a referral for the alleged abuse / neglect of a child?

2. Is a social worker employee of a child protection services agency required to obtain parental consent or a court order to do an invasive sexual abuse examination of a minor child?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs/Appellants in the Courts below are the Petitioners herein: George Doe, individually and as Guardian Ad Litem; Lacey Doe, a minor.

Defendants/Appellees in the Courts below were: Lisvet Carrillo-Herrera; County of Santa Clara; Santa Clara County Department of Social Services; and Santa Clara County Child Protective Services.

Additional Defendant at Trial Court: Betsey Warren Lebbos

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's Order Granting Partial Summary Judgment Regarding County's 42 U.S.C. 1983 Claim; Order To Show Cause Regarding Plaintiffs' 42 U.S.C. 1983 Tort Claim Against Defendant Lebbos; and Order To Show Cause Why Action Should Not Be Remanded To State Court (filed April 12, 2002), and a subsequent related Order Denying Request For Continuance; Granting Partial Summary Judgment In Favor Of Lebbos Regarding 42 U.S.C. 1983 Claim, And Remanding Action To State Court (filed May 28, 2002), are unpublished, but included herein as Appendix A and B, respectively. The Ninth Circuit Court of Appeals decision affirming the district court's order is published and can be found at 348 F.3d 820, and is included herein as Appendix C. The circuit court's decision denying rehearing and rehearing en banc is unpublished and included herein as Appendix D.

JURISDICTION

The Ninth Circuit issued its decision on November 4, 2003, and denied rehearing and rehearing en banc on January 14, 2004. This Court has jurisdiction to review this pursuant to 28 U.S.C. 1254(1). Jurisdiction in the court of first instance was based on 28 U.S.C. 1331.

STATUTORY PROVISIONS INVOLVED

This case involves the 4th and 14th Amendments to the U.S. Constitution, and 42 U.S.C.A. 1983, set forth herein in Appendix E.

STATEMENT OF THE CASE

This case involves a social worker who maliciously pursued the destruction of a familial relationship between a four year old girl and her single father. On October 30th, 2000, plaintiff George Doe, individually and as Guardian Ad Litem for his daughter Lacy Doe, filed a Complaint for Damages in the Santa Clara County Superior Court against

various individuals, including a county employed social worker (Herrera) and the County of Santa Clara.[1] The complaint included various state law tort claims and civil rights claims pertaining to the violation of the plaintiffs' Fourth and Fourteenth Amendment rights as they related to the removal and continued detention of Lacey Doe (then age 4) which commenced November 2nd, 1999, as well as to an invasive vaginal sexual abuse examination performed without court order, parental consent, or exigent circumstances.

Mr. Doe has been a practicing attorney, licensed to practice before all of the courts of the State of California, and the district courts of the 9th Circuit, for almost 20 years. In December of 1996 he shut down his law practice in Santa Clara County because his father in Miami, Florida, asked him to return home to help run the family business and care for his ailing mother. In addition to helping with the family business and caring for his mother, Mr. Doe took a job with H&R Block, and quickly rose to become manager of two satellite offices. He also provided bi-lingual interpretation.

Lacey was immediately provided medical insurance through Mr. Doe's father's company, and had regular doctor appointments, as well as seeing an opthamologist regularly. She was enrolled with a daycare provider as well, and was in daycare until the day she left Florida.

Mr. Doe quickly found with his father's incessant verbal and emotional abuse still existed. Once his mother was safely in a facility appropriate for her medical needs, Mr. Doe made plans to return to California.

Previously in California, he had rented office space to an attorney named Betsy Lebbos. After a pattern of extremely bizarre conduct, he finally evicted after she had been found passed out drunk in another office. Still, they had maintained sporadic contact since those times.

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[1] Lacey's mother is not involved in the underlying action as she had died before Lacey was removed from Mr. Doe's care.

While in Florida he had some telephone contact with her, during the course of which she convinced him she was a changed person, she was no longer drinking, had found Christ, and had stopped her long pattern of harassing judges, attorneys, and the State Bar.[2] When discussing thoughts of returning to the Bay Area and resuming his practice of law, she offered to provide him with accommodations and whatever interim support he needed. He had offers from other old friends, but chose to accept her offer based on considerations of proximity to his practice area, and a desire not to impose on other friends with families.

In responsible anticipation of his move he packed and shipped items to her home such as a typewriter, various files and miscellaneous items, and kept documents evidencing the mailing of the items. He purchased plane tickets a week and a half in advance of travel, then packed several suitcases. Even before leaving Florida, he secured a bankruptcy client who mailed him $500 before he left, and agreed to provide $1000 more upon arrival.

Just before leaving he was told by Lacey's daycare provider that Lacey was a urination problem. He asked his father to take the child to the pediatrician while he was at work. The pediatrician recommended some type of evaluation, after which it was determined a procedure was needed. Based on that, he took Lacey to Miami Children's Hospital the next day (October 26th, 1999) where the child underwent a cystourethrogram, which involved inserting some rod and tubing into her urethra, up to her bladder. The doctor told Mr. Doe that Lacey had no apparent problems, and said nothing of any infection, urinary or otherwise. He explained that hee could expect Lacey to have pain upon urination, swelling and redness for three to five days.

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[2] A sampling of such cases; *Lebbos v. Judges of the Superior Court, Santa Clara County*, (9th Cir. 1989) 883 F.2d 810, *Lebbos v. State Bar* (1991) 53 Cal.3d 37, *Lebbos v. State Bar* (1985) 165 Cal.App.3d 656, *Matter of Lebbos*, (1997) 407 Mass. 1010, 672 N.E.2d 517 - cert denied 520 U.S. 1275, *Lebbos v. San Jose Municipal Court*, (1990) 495 U.S. 930 – cert denial, *Lebbos v. Arguellos*, (1993) 507 U.S. 918 – cert denial

Mr. Doe left for California on the 27th of October, 1999. Shortly after arrival at the Lebbos residence, it became apparent she was still emotionally disturbed and an alcoholic. He found multiple bottles of liquor in a cabinet in the kitchen of the home. By October 31st, he was making plans to move out of Ms. Lebbos' home.

Mr. Doe and Lacey stayed with a friend (Mr. Saldana) on the 31st of October, 1999, and November 1st. On the 2nd of November, he put Lacey into a licensed daycare facility known as Kid's Park in San Jose while he and Mr. Saldana went to Lebbos' home to pick-up his belongings on November 2nd. When he arrived Lebbos would not let him in to get his things, telling him, "[I]f you don't let me have Lacey, I am going to report you to CPS for abuse and they are going to put Lacey in a foster home forever." He immediately left and called for a civil standby.

When he returned with the police Lebbos went beserk, began screaming at the police officers, and refused to release Mr. Doe's belongings unless CPS was called. Three police officers became involved at the scene. She had apparently already prepared a six page "Declaration" which she gave to one of the officers. The "Declaration" was replete with outright lies and fabrications about the treatment of Lacey by Mr. Doe.

To assuage Lebbos, and accomplish Mr. Does' removal of his things, the officers agreed to go visit Lacey at Kid's Park. When they got there and could not find a Spanish speaking interpreter to assist them in communicating with Lacey, they inexplicably chose to take her to the Children's Shelter. The investigating officer expressly indicated in his report that his lieutenant instructed him to "take the minor to [the] shelter for protective custody and determine if any validity to accusations;" the child was taken merely to "investigate further." There were no exigent circumstances and no warrant was obtained, or even sought.

Nowhere in the report prepared by the police officers who detained Lacy is there a single allegation of general neglect of Lacey, much less abuse. The officer reported that

he, "did not observe any physical trauma to the exposed areas on visual contact," and wrote, "[h]er disposition was very happy, friendly and cheerful." Additionally, through conversations with Mr. Doe, the police learned the following information that was included in their police reports: 1.) just prior to leaving Florida Lacey had been taken to the hospital; 2.) the child had medical insurance; 3.) she had been seen by a doctor on the 26th of October, 1999, for a urinary tract problem; 4.) an exam and procedure on Lacey had taken place at Children's Hospital in Florida October 26th, 1999, and he provided the address of the facility.

After Mr. Doe and his friend retrieved his belongings from the Lebbos home, he went to Kid's Park to pick up Lacey, only to find that the police had taken her to the shelter. Mr. Doe was devastated. That day or the next, he was contacted by defendant Herrera.

Defendant Herrera was a social worker working as a Dependency Investigator for Santa Clara County Child Protective Services, hired to that position a mere two months prior In Mr. Doe's very first conversation with her, she told him he had "abused" Lacey, and accused him of being a child molester. He was stunned, and when he protested his innocence she replied that he was "in denial," and, "needed help." She further said she had a child abuse referral on him, against his daughter Heather Doe in 1993, and again in 1999.

Mr. Doe explained that those claims were preposterous, that he had never been contacted by anyone about any claims of abuse, ever, and he wasn't even in California at the time of the alleged abuse in 1999. He offered to retrieve evidence (paystubs and calendars) showing he hadn't been in the state and provide it to her. He told her that if the ex-girlfriend (mother of Heather) made the 1993 claim, it should be suspicious since she had given sole custody of the child to him in 1994. When Mr. Doe told Ms. Herrera that her information was erroneous and thus misleading to the court, her response was, "So what?"

Ms. Herrera told Mr. Doe he had simply shown up at Lebbos' doorstep without warning, indicating he had no

place to stay, and that he had provided Lacey "inadequate" food, clothing, medical care, and shelter. She repeated these claims in her first report to the court. Mr. Doe offered to give her documents showing he had shipped items in advance to Lebbos' address, and had purchased plane tickets. He also offered the following *easily verifiable* contradictory information and evidence: 1.) he asked her to come to the house he was living in, a 2700 sq. ft. home in Morgan Hill, California, on two-plus acres of land; 2.) he asked to show her the two suitcases full of clothes that he had for his daughter (he did provide pictures of same which she never included in court reports); 3.) he explained that Lacey had medical insurance and gave the information; 4.) he explained that Lacey regularly saw the doctor in Florida (Dr. Priquez), and gave Herrera her name and number; 5.) he explained about the medical procedure and offered to get the records, advising her that the doctor who performed it said that Lacey was fine but would have some pain and irritation in her genital area and when urinating for three to five days; 6.) he offered Herrera the name and number of the day care provider in Florida, a person who could attest to his care of Lacey *for the past three years* (Herrera never called her); 7.) he asked that she speak with the client who had already sent him money to handle a legal matter before he left Florida. Herrera refused to make any attempt to investigate Mr. Doe's claims, contact his references, or accept his documentation, regardless of the ease of doing so.

In an effort to head off what he clearly sensed was outrageous zealousness on the part of Ms. Herrera to take his child, he explained the history and drunken past of Lebbos, including her years of verbal and even physical altercations with members of the local judiciary. [*See* footnote 2] He offered to provide her reams of information on Ms. Lebbos that would show how mentally unstable she was; she refused. Despite her refusal, he did gather 99 pages of legal pleadings and public court documents clearly evidencing Lebbos insanity and gave them to Herrera. Herrera never attached any of it to any of her reports submitted to the court.

Upon initial receipt of the matter regarding Lacey, Herrera received various internally generated documents of her employer, and the police report from the officers who initially took custody of Lacey. The forms included an Intake Form from the shelter, a Screener Narrative, a Juvenile Contact Report prepared by the police who removed Lacey, and finally, a Declaration of Reasonable Efforts Detention Report. Nothing in any of these documents could remotely or even conceivably, establish a risk to Lacey. That left only the six page letter Lebbos provided to the police, of which, the content and tone alone would cause a reader to question the author's mental stability. Herrera also ran a database search regarding child abuse referrals, which is where she obtained the information regarding alleged abuse in 1993 and 1999. She claimed in this case, that she had no information in the data provided as to the *outcome* of the referrals ("unfounded," "unsubstantiated," etc...), and admitted not having sought or obtained further information for over a month. Both were closed as unfounded.

The only further investigation by Ms. Herrera prior to filing the initial dependency petition consisted of a brief meeting with Lacey, phone conversations with two children's shelter employees with no knowledge of Mr. Doe's prior care of Lacey, and phone conversations with Lebbos, Dr. Priquez (who did not perform the procedure on, and Lacey's maternal grandmother Gloria Goure (who hadn't seen Lacey in over a year).[3]

On November 4th, 1999, Herrera filed the initial dependency Petition in the juvenile court. In the initial petition she sought jurisdiction over Lacey on the grounds of Welfare & Institutions Code Section 300(b), and under

[3] Ms. Goure later swore out a declaration about misrepresentations made by Herrera of their phone conversation, which Herrera had included in reports to the court, saying the statements attributed to her were false.Herrera reported to the court that Ms. Goure had told her that her daughter (mother of a prior child of Mr. Doe) thought that Mr. Doe might be molesting Lacey. Mr. Goure denied the subject ever even came up in her phone call with Herrera.

Section 300(d), which relates to charges of sexual abuse on a child.[4] With no basis in any fact or evidence, she was alleging Lacey had been sexually abused by her father.

At the initial hearing on the detention on November 5th, 1999, Herrera did not attend. The only documents submitted to the court by her counsel were the Petition filed 11/4/99, a report prepared by Herrera, with some attachments. Although Herrera had refused to review *any* of the information or documentation Mr. Doe offered her, Ms. Herrera did choose to attach the 6 page "declaration" of Lebbos, without any comment about what Mr. Doe had told her of Lebbos' history, or that Lebbos had told her she wanted the child placed with her. At no point in her report did Herrera inform the court of any of the exculpatory or contradictory information contained in the police reports, the Declaration of Reasonable Efforts Detention Report, the Child's Intake Informational Sheet, or the Screener Narrative.

At the hearing, the court asked Ms. Herrera's attorney, "Miss Warsaw, do you know if Lacey is getting some physical treatment at the shelter for her vaginal infection?" To which Ms. Warsaw replied, "I don't know, your Honor. I did intend to ask the social worker that this morning. She was not here, and I did not get the opportunity to call her, but I will be checking into that." The court replied, "All right. Because that's very important because she had been complaining that it's painful."

At no point in the court proceeding did the court make an order for a *sexual abuse examination* of Lacey Doe ("SART" exam in Santa Clara County). The court was not told that, in fact, Lacy did not have a vaginal infection or vaginal discharge. Herrera knew from discussion with shelter clinic staff that Lacey did not have any vaginal discharge when she arranged for a vaginal sexual abuse examination of Lacey Doe on November 10th, 1999. In this abuse examination, the

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[4] Section 300(b) is referred commonly as the "failure to protect" subdivision.

outside, and the inside, of young Lacey's vagina, and to some extent her anus, were probed and photographed. There is no "treatment" aspect of any kind to a SART examination; it is purely diagnostic and forensic in nature.

Subsequently, on or about November 18th, 1999, Herrera submitted a Jurisdictional/Dispositional Report and 1st Amended Petition in which the sexual abuse allegation in the first Petition was dropped. Before filing these documents Herrera knew that Lacey did not have vaginal discharge, knew that Mr. Doe had health insurance for his daughter, knew he had a regular pediatrician for his daughter in Florida, and knew that Lacey had in fact been seen for a medical procedure involving her urinary tract just days before coming to California and thus was obviously receiving medical care. She knew that Mr. Doe had provided adequate food, shelter, and clothing, and that the child had not been removed by the police due to general neglect, as she had their police reports and attached them to the Jurisdiction/Disposition report. Ms. Herrera also knew that Mr. Doe had money immediately upon his arrival in the Bay Area and had not "shown up on [Lebbos] doorstep unannounced." Still, each of the allegations (in one form or another), except sexual abuse, remained in the 1st Amended Petition and were reiterated as facts in the Jurisdiction/Disposition report.

Ms. Herrera filed a Second Amended Petition on or about December 16, 1999, in contemplation of a jurisdictional trial scheduled for that very month. It was nothing more than a transparent effort to trump up the claims against Mr. Doe. The allegations regarding the San Jose Police taking Lacey into protective custody for "general neglect" were unbelievably "enhanced." The allegation grew from "inadequate" food, clothing, etc..., to literally "failing" to provide or arrange for food for his child, and "neglecting" seeking medical care. Despite all evidence being to the contrary, Herrera inflated the allegations of the Petition.

Inexplicably, in the second amended petition Herrera again asserted a 300(d) "sexual abuse" claim. This time the claim was that Mr. Doe had sexual relations with the mother of Lacey's half-sister (Heather) after putting Heather to bed *in another room* in the house, and she reinserted the alleged referral from Santa Cruz County in 1993. She also threw in the mix allegations of sexual abuse regarding Heather and another child, as well as an allegation that Mr. Doe provides no support for Heather, despite never speaking with Mr. Doe about such a claim.

Between the time the Second Amended Petition was filed (12/16/99), and the court actually held a hearing on the issue of jurisdiction on February 28, 2000, Ms. Herrera learned on December 6th, 2002, that *the sexual abuse referral in 1993 was closed as "unfounded."* Despite her possession of this exculpatory information, this information was not disclosed to the court or Mr. Doe at the time of the hearing, nor was her Petition amended to include it. Yet, Herrera was present in court the entire hearing, watching and smiling.

At the jurisdiction hearing, a settlement conference of some kind between counsel was held, in addition to a lengthy meeting in chambers with the judge. Upon emerging from the meeting, all of the allegations in the 2nd Amended Petition were struck, with the exception of one. Paragraph B-2 was amended to read, "Further Mr. [Doe] has a problem with alcohol which periodically renders him unable to care for the child." When the court is questioning Mr. Doe about his understanding of what has occurred with the reduction of the allegations, and seeking his submission thereto, Mr. Doe replies, "*To be totally honest with the court, I am doing this only to get Lacey back, so I will plead to that, but only for the purpose of getting Lacey back.*"

Herrera's efforts had worked. She had broken the Doe family asunder with lies heaped upon lies, unfettered by mountains of evidence to the contrary.

Lacey remained out of the custody and care of her father in various foster care facilities, or living with families of one kind or another, for a period of approximately one and one-

half years. A summary explanation of Lacey's circumstances upon removal and upon return to Mr. Doe are summarized well in the dissenting opinion in *Doe v. Lebbos*,

> The agency screener characterized this supposedly neglected child, a few hours after being whisked away, as "friendly and cooperative . . . . She appeared to enjoy watching cartoons and playing with toys, exhibited curiosity about her surrounding. She displayed no anxiety to be among strangers and ate a sandwich, chips and cookies hungrily." Those who took Lacey away left behind her glasses. Her father brought them to court and asked that they be delivered to her. The bureaucracy, it appears, focused on her genitals, not on her eyes, despite her obvious amblyopia. The physician's assistant who did the sex abuse examination and photography likewise characterized Lacey upon arrival at her office as a "pleasant, cooperative preschool female in no acute distress," normal in height, weight, and other respects.
>
> After being bounced around in the agency and foster-parent bureaucracy for over a year, Lacey was quite a different little girl. She was "diagnosed with Post-Traumatic Stress Disorder, hearing voices, and suicidal ideation." She was put on anti-psychotic medication. She had taken to smearing feces and to other abnormal and highly disruptive behavior. Though Lacey had somehow held her personality together through her mother's death, her father's lack of financial success, and the move back to California, what the county did to her to "protect" her apparently destroyed her. Something in this experience, perhaps being ripped away from her father for whom she consistently expressed love during the

> whole miserable period, perhaps having strangers strip her and search her heretofore private parts, perhaps being put with caretakers instead of her father, amounted to a trauma that was too much for her. [Dissenting opinion, J. Kleinfeld, at pp. 834]

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the 9th Circuit decision in this case creates a conflict within the circuit, as well as a conflict with decisions of other circuit courts. There is significant conflict among the circuit courts as to the level of immunity to be afforded social worker employees of child protection agencies, and divergent views on what activities, if any, should be accorded absolute immunity. This Court has never clarified this distinct area of the law, and clarification is badly needed.

Additionally, the decision conflicts with principles on immunity from numerous Supreme Court decisions, inclusive of *Saucier vs. Katz*, *Antoine v. Byers*, *Buckley v. Fitzsimmons*, *Kalina v. Fletcher*, *Stanley v. Illinois*, *Bell v. Hood*, and *Burns v. Reed*, which pertain to the analysis and application of immunity and familial rights in cases involving state actors.

Finally, the decision involves issues of extreme societal importance relating to personal bodily privacy of children and what requirements must be met to violate that privacy, and this Court's review can affect the integrity of the hundreds of thousands of families subjected to a child protection agency investigation, many of whom are living the nightmare experienced by Mr. Doe and Lacey.

A. The Decision Overlooks Material Points Of Law In The Circuit's Own Holdings On Immunity

This is a 42 USC §1983 action brought by a father and daughter against a social worker who maliciously made false allegations of sexual abuse and general neglect, failed to investigate allegations of abuse, engaged in egregious investigatory and court-reporting misconduct, including but not limited to, ignoring and not reporting exculpatory evidence, fabricating evidence, and swearing under oath to false "facts." The plaintiffs also specifically complained with regard to the social worker's ordering of an invasive sexual abuse evaluation of the four-year old child plaintiff without a court order, parental consent, or exigent circumstance.

The district court granted the defendant Herrera's motion for summary judgment on all federal law causes of action on the grounds of immunity. Plaintiffs appealed from that ruling. In its opinion, the circuit court panel stated,

> "We hold that Herrera's actions in alleging failing to *investigate* adequately the allegations of abuse and neglect against George and allegedly fabricating evidence in the dependency petition she prepared for the court were part of the initiation in pursuit of the child dependency proceedings, for which Herrera was entitled to absolute immunity."

The court went on to apply a qualified immunity standard for all other actions taken by Herrera in connection with the case, including her referral of the child for an invasive sexual abuse evaluation.

The panel's decision to grant absolute immunity to Herrera for her actions in *investigating* and *fabricating* evidence defied the 9th Circuit's own en-banc decision in *Miller vs. Gammie* (9th Cir. 2003) 335 F.3d 889, as well as a prior decision in *Milstein vs. Cooley* (9th Cir. 2001) 257 F.3d 1004.

In the *Miller* case (*supra*), an en-banc panel of the 9th Circuit dealt with the issue of absolute immunity for social workers and clearly acknowledged the appropriateness of the functional analysis approach outlined by the Supreme Court in cases such as *Kalina v. Fletcher* 522 U.S. 118 (1997). The en-banc panel in *Miller* stated "at least two of our sister circuits have also recognized that the scope of absolute immunity for social workers is extremely narrow," and cited to *Vosburg v. Dep't of Social Services* (4th Cir. 1989) 884 F.2d 133, as follows:

> "In *Vosburg*, citing our court's decision in *Meyers*, the Fourth Circuit held social workers absolutely immune from liability resulting from decision to file a removal petition, which was deemed prosecutorial, *but not immune for investigating whether a removal petition should be filed.*" *Miller, supra* at 898. (emphasis added).

Further while the panel in *Doe v. Lebbos* cited *Meyers v. Contra Costa County Department of Social Services* (9th Cir. 1987) 812 F.2d 1154 extensively in support of their conclusion that absolute immunity applied for *everything* social worker Herrera did in her pre-petition and post-petition investigation and conduct, nowhere in *Meyers* did the 9th Circuit extend absolute immunity to the *investigative function* of social workers. To the contrary, in *Meyers* the court found that social workers have only qualified immunity for their actions prior to the filing of the petition. (*Id* at 1157)

Given this stark contrast between 9th Circuit decisions, the ruling creates a dilemma in the appeal decision-making process for both plaintiffs and defendants in cases involving malicious actions of a child dependency social worker.

B. The Decision Conflicts With Supreme Court Rulings On The Narrow Scope And Application Of Absolute Immunity And Application Of A Functional Analysis In Immunity Determinations

The limited availability of absolute immunity was addressed in *Buckley v. Fitzsimmons* (1993) 509 U.S. 259, wherein this court denied absolute immunity to prosecutors who were sued for fabricating evidence "during the early stages of the investigation" where "police officers and assistant prosecutors were performing essentially the same investigatory functions." 509 U.S. at 262-63, 275-76. In *Buckley,* after three expert witnesses could not connect a boot print to the suspect (the §1983 plaintiff) for the prosecutors, they "shopped" for the opinion of an expert well known for her willingness to fabricate unreliable expert testimony. *Id.* at 262. Herrera's conduct is surely no less outrageous than "shopping" for experts to create evidence. She created it herself, and ignored and hid exculpatory and explanatory evidence from the court to achieve her desired result.

In denying absolute immunity, the *Buckley* court reasoned:

> "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" Id. at 273 (quoting *Hampton v. City of Chicago*, (7th Cir. 1973) 484 F.2d 602, 608 (Stevens, J.) (denying absolute immunity for prosecutor who participated in planning and execution of police raid on suspected weapons cache); *see also*, *Kalina v. Fletcher*, (1997) 522 U.S. 118 at 126; *see also Herb Hallman Chevrolet v. Nash-Holmes* (9th Cir. 1999) 169 F.3d 636 at 642 ("A prosecutor may only shield

his investigative work with qualified immunity.").

The *Buckley* court announced a line before which absolute immunity could not apply: "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley, supra* 509 U.S. at 274.

Much the same lines, with a view to *function* of the state actor, were drawn as to the applicable immunity level to be applied in the recent Supreme Court case of *Kalina v. Fletcher*, 522 U.S. 118 (1997). In *Kalina* this court stated,

> "*Imbler v. Pachtman,* [citation omitted], and subsequent cases recognize that a criminal prosecutor is fully protected by absolute immunity when performing *the traditional functions of an advocate*, see, *e.g., Buckley v. Fitzsimmons,* [citation omitted], *but is protected only by qualified immunity when he is not acting as an advocate, as where he functions as a complaining witness in presenting a judge with a complaint and supporting affidavit to establish probable cause for an arrest*, see *Malley v. Briggs,* 475 U.S. 335, 340-341, 106 S.Ct. 1092, 1095-1096, 89 L.Ed.2d 271. Under these cases, petitioner's activities in connection with the preparation and filing of the information against respondent and the motion for an arrest warrant clearly are protected by absolute immunity as part of the advocate's function. Indeed, except for her act in personally attesting to the truth of the averments in the certification, the preparation and filing of that third document was protected as well." [emphasis added]

In this case, the social worker was assigned first to *investigate* the allegations of abuse by George Doe. In

California, such a duty is a mandatory function for a social worker. California Welfare & Institutions Code §309 states in pertinent part:

> (a) Upon delivery to the social worker of a child who has been taken into temporary custody under this article, the social worker **shall** immediately investigate the circumstances of the child and the facts surrounding the child's being taken into custody and attempt to maintain the child with the child's family through the provision of services. The social worker **shall** immediately release the child to the custody of the child's parent, guardian, or responsible relative unless one or more of the following conditions exist..." [emphasis added – none of the conditions applied]

Once a reasonable investigation is complete, then, and only then, is the social worker supposed to make the decision on whether or not to file a dependency petition under W&I § 300. Investigating initially, making the decision to file, then further investigating and reporting to the court selectively, based on an unfounded and malicious pre-determination cannot and should not ever be protected by absolute immunity. [*See*, cf. *Sevigny v. Dicksey,* 846 F.2d 953, 957 (4th Cir.1988) – absolute immunity denied police officer who made arrest decisions based on mere beliefs without reasonable investigation].

The 9th Circuit's decision in this matter utterly disregards functional analysis and creates a perverse incentive for social workers to not perform thorough, or even reasoned, investigations and deters not one iota the most abominable conduct. As a result of this decision, it literally does not matter whether the social worker even does an investigation, or whether a social worker entirely fabricates the allegations they include in a petition for dependency - they are absolutely immune regardless of fraud, coercion, or burying

contradictory evidence if they then wrap up their ill-gotten case in a Petition and file it. This is a perverse incentive to file a dependency petition regardless of the reasonableness of an abuse/neglect investigation or what that investigation revealed.

The panel's decision ignores the functional analysis of *Buckley* and affords social workers absolute immunity that *neither* police officers nor prosecutors enjoy when they act as investigators. There is no justification for a grant of absolute immunity to social workers. This Court has made it clear that even prosecutors are not absolutely immune for performing investigatory functions, *Buckley, supra,* and it appeared that the 9th Circuit had agreed, *Milstein, supra.* The decision in *Doe v. Lebbos* ignores any distinction in function.

There is no authority whatsoever for the proposition that social workers performing investigatory functions should enjoy immunity not afforded both prosecutors and policemen, or suddenly benefit from absolute immunity because they then file a Petition, which is not in any appreciable way different than acting as a complaining witness seeking a warrant. To the extent the Supreme Court has upheld absolute immunity for prosecutors, it has been because of the fact that their misconduct is deterred by the threat of criminal prosecution, professional discipline, and accountability to the electorate. *Burns v. Reed* (1991) 500 U.S. 478, 476; *Imbler v. Pachtman* (1976) 424 U.S. 409, 418. None of these important checks and balances exist where social workers are concerned, and thus there is no rational basis for affording them the immunity of prosecutors.

Another practical aspect of consideration as to whether a social worker should be afforded absolute immunity - if a functional analysis is properly applied - is the simple fact that child dependency cases are "prosecuted" by the county counsel for the county in which the proceeding lies. This means that these cases already have a "prosecutor," and the social worker is therefore by default not a prosecutor. In

California, for example, state law clearly designates that social workers perform their work in the capacity of a probation officer. [W&IC 272] A probation officer performs a purely investigative function, and is not in any sense "prosecutorial." How, under any circumstance, could social workers then receive "prosecutorial immunity?" They cannot.

1) Proper Functional Analysis Requires Reference To The Law Of The State In Which The Violations Occur

In recognition of the impact of state laws on determining the function of a social worker, the 9th Circuit en-banc panel in *Miller* stated, "...state laws may differ as to the functions such workers perform."(*Id* at 898). This is the rational perspective that petitioners urge upon this court; that states may modify the duties and obligations, and thereby the "functions" of social workers. This court has recognized that state laws can and often do apply to create liberty interests (*Davis v. Scherer* (1984) 468 U.S. 183).

In California, the legislature placed substantive limitations on the discretion of social workers investigating allegations of child abuse by passing Government Code § 820.21. The law was passed in 1995 after a particularly egregious case of social worker and court-appointed therapist misconduct - falsely accusing a father of molestation of his daughter, and hiding or ignoring the plethora of evidence contrary to that position. Cal. Gov. Code § 820.21 provides that,

> "notwithstanding any other provision of the law, the civil immunity of juvenile court social workers...shall not extend to any of the following, if committed with malice[5]:

[5] "Malice" is further defined in G.C. 820.21 to mean, "conduct that is intended by the person described in subdivision (a) to cause injury to the plaintiff or despicable conduct that is carried on by the person described in subdivision (a) with a willful and conscious disregard of the rights or safety of others.

1) Perjury
2) Fabrication of evidence
3) Failure to disclose known exculpatory evidence
4) Obtaining testimony by duress, fraud, or undue influence.

In enacting this law, the California Legislature expressly sought to deny social workers the absolute immunity that it concluded was afforded them by the 9th Circuit's holding in *Meyers v. Contra Costa Dept. of Social Services.* As the Author's Statement in the legislative record notes, the *Meyers* decision resulted in a situation where "social workers have more civil immunity than police officers." The author felt that absolute prosecutorial immunity should not be afforded social workers because they are not elected, juries do not scrutinize their actions, they are not subject to peer review, and they are not required to establish guilt beyond a reasonable doubt. [See Appendix F - Author's Statement Regarding AB 1355, which became G.C. 820.21]

The legislative history of Government Code Section 820.21 makes it clear that California does not consider social workers to be prosecutors. [See Appendix G - letter from Governor Pete Wilson from legislative materials on AB 1355, which became G.C. 820.21[6]] By enacting Gov. Code Section 820.21, the California legislature clearly intended to protect the rights of families to live without "unnecessary government interference." *Santosky v. Kramer* (1982) 455 U.S. 745, 753. The decision in *Doe v. Lebbos* completely disregards this legislative decision, clearly undercuts the protection it was intended to afford, and even encourages the violation of those very rights.

While it is true that a violation of State Law does not automatically lead to liability under 42 U.S.C. § 1983, state law may bear on a claim under the due process clause where

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[6]Both Author's Statement and Governor's letter were included in Petition for Rehearing & Rehearing En Banc.

the state has created an interest protected by the Fourteenth Amendment. *Davis v. Scherer* (1984) 468 U.S. 183. This Court declared "a state creates the protected liberty interest by placing substantive limitations on official discretion" through state law or regulation. *Olim v. Wakinekona* (1983) 461 U.S. 238, at 249. In illustrating this point of law, the 9th Circuit Court of Appeals relied on *Olim* in holding that California Statute that permits prisoners to make three phone calls immediately after arrest clearly establishes a liberty interest protected by the Constitution. *Carlo v. City of Chino* (9th Circuit 1997) 105 F.3d 493, at 502.[7]

With regard to social workers, California has mandated that they shall not employ perjury, fabrication of evidence, fraud, duress or undue influence in obtaining evidence. Social workers are required to include exculpatory evidence. Herrera included no exculpatory evidence at all, and fabricated evidence as well in this matter. For that she should be entitled absolute immunity? Surely, the rights of parents and children to have a reasonable, honest, and impartial investigation of the serious and socially damning allegations of child abuse, and to have that investigation honestly related to the court, are no less important than the right of an arrestee to three phone calls. (*Carlo*, *supra*)

C. The Panel's Decision Is In Conflict With Other Courts Of Appeal And There Is Significant Conflict Between The Circuit Courts Of This Supreme Court On Social Worker Immunity

The 9th Circuit decision in this case is in direct conflict with numerous other Courts of Appeal decisions on the issue of social worker immunity, and it adds to the existing helter-skelter conclusions on social worker immunity evidenced by

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[7] The statute at issue in *Carlo* (Pen.C 851.5) stated that an arrested person "shall be entitled to make three [ ] calls." The plaintiff had been denied that right. In *Carlo*, this court found a protected liberty interest because the statute was mandatory. *Id at 499*

the conflicting circuit court decisions. [*See DeCosta v. Chabot* (1st Cir. 1995) 59 F.3d 279 – state actors protected only by qualified immunity for child abuse investigation; *Robison v. Via* (2nd Cir. 1987) 821 F.2d 913 - defendants not entitled to absolute immunity from due process claim based on taking children to investigate abuse reports based on claim of performing prosecutorial function or importance of investigating abuse; *Vosburg v. Dept of Social Services* (4th Cir. 1989) 884 F.2d 133 – absolute immunity for preparing and filing petition, and after child in foster care; *Austin v. Borel* (5th Cir. 1987) 830 F.2d 1356 – qualified immunity, even as to filing of removal petition; *Holloway v. Brush* (6th Cir. 2000 en banc) 220 F.3d 767 – absolute immunity only when acting in capacity as legal advocates, not when performing administrative, investigative, or other functions; *Doe v. Heck* (7th Cir. 2003) 327 F.3d 492 – social workers entitled to qualified immunity, no mention of applying absolute immunity at all; *Snell v. Tunnell* (10th Cir. 1990) 920 F.2d 673 - social workers investigating abuse claims analogous to police officers and entitled only to qualified immunity; *Gray v. Poole* (D.C. Cir. 2002) 275 F.3d 1113 – investigative activities analogous to police officer are entitled to qualified immunity only]

This court has held that "the presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been quite sparing in our recognition of absolute immunity, and have refused to extend it any further than its justification would warrant". *Antoine v. Byers & Anderson Inc.* (1993) 508 U.S. 429, 433. The 9th Circuit panel decision in the instant case is far, far from "sparing," and it is a tremendous step backward in the attempt to maintain a balanced framework of protection for families, and protection for social workers, that does the least damage to our children and our families.

This court is reminded of the opinions of Supreme Court Justices Thomas and Scalia, who have stated that they are not convinced that social workers can ever function as

prosecutors for purposes of §1983 analysis. *Hoffman v. Harris* (1994) 511 U.S. 1060, at 1063, denying review in case of social worker misconduct. Justice Thomas, in discussing the application of absolute immunity, opined, "The courts that have accorded absolute immunity to social workers appear to have overlooked the necessary historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under § 1983. *See ibid.* This all assumes, of course, that "social workers" (at least as we now understand the term) even existed in 1871. If that assumption is false, the argument for granting absolute immunity becomes (at least) more difficult to maintain. Cf. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993) (denying court reporter absolute immunity in large part because official court reporters did not begin appearing in state courts until the late 19th century).

The dissent by Justice Thomas in *Hoffman* closed with the comment, "We should address the important threshold question whether social workers are, under *any* circumstances, entitled to absolute immunity." Petitioners implore this court to do this now. Alongside the plaintiffs in *Hoffman*, and the plaintiffs in this case, are thousands, if not hundreds of thousands of families, who are being subjected to this misguided and frequently malevolent zeal to "protect."[8]

Review of this case would allow this court to address this issue directly, and to set a clear demarcation of the level of immunity to be afforded social workers. Currently, many such state actors act with absolute impunity repugnant to a free society operating under a rule of law.

It is beyond cavil that this proceeding involves a question of exceptional importance which could substantially affect a

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[8] When the Child Abuse Prevention And Treatment Act was enacted in 1971, its chief sponsor, Walter Mondale, expressed concern that it might lead to abuse; it has.

rule of national application in which there is an overriding need for national uniformity. Add to the abundant conflict in the circuit courts, the simple fact that the subject matter of this area of law is nothing less than a core institution of American society - the family - and it becomes fair to say it is imperative that this court definitively opine on the level of immunity to afforded social workers of child protection service agencies.

D. The Panel's Decision Granting Immunity To Herrera For The Invasive Sexual Abuse Evaluation Performed On Lacey Defies Prior Supreme Court Decisions On Personal Privacy And Familial Association Rights

This court held long ago that the right to familial association includes the right of parents to make important medical decisions for their children and of children to have those decisions made by their parents rather than the state. *Parham v. J.R.* (1979) 442 U.S. 584, at 602. In *van Emrik v. Chemung County Dept. of Social Services* (2nd. Cir. 1990) 911 F.2d 863, the court said,

> "the Constitution assures parents that, in the absence of parental consent, [physical examinations] of their children may not be undertaken for investigative purposes at the behest of state officials unless a judicial officer has determined, upon notice to the parents, and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances". [*Id* at 867; also cited in 9th Circuit case of *Wallis v. Spencer*]

In the absence of an urgent medical problem requiring treatment, or a reasonable concern that material physical evidence may otherwise dissipate, a social worker had been required to obtain parental consent or a court order to obtain

an investigative medical examination of a child. *Wallis v. Spencer* (9th Cir. 2000) 202 F.3d 1126 at 1141. In this case, there was neither an urgent medical problem nor a concern for the dissipation of physical evidence in this case, as **eight days** elapsed from the time Lacey was removed until the SART examination. Additionally, the social worker did not send Lacey for *treatment* of a vaginal infection - it is undisputed that she sent the child for an unneeded forensic sex abuse *examination*. She literally fished in this little girl's body hoping to catch the case she wished to build against her father, sexual abuse.

The majority in *Doe v. Lebbos* conceded that on the Does' version of the facts, Herrera violated the Does' constitutional rights and that the first prong of *Saucier v. Katz* (2001) 533 U.S. 194 was satisfied.[9] The majority then made an argument that it conceded was never made by the Defendants; i.e. that the social worker ordered an evidentiary examination based on the mistaken belief that the court had ordered such an exam. The defendants herein made no such claim, proffered no facts to support such a claim, and in fact argued that Lacey was referred for a "medical examination."

After citing *Saucier v. Katz, supra*, the panel determined that with regard to the physical examination, the facts satisfied the "first Saucier prong" per *Wallis v Spencer, supra*. Past that point, the majority diverged from rational application of facts to law, and widely from the intent of the second prong of immunity analysis set forth in *Saucier*. Petitioners further contend that the court dismissed the violation of familial association aspect of Herrera's actions

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[9] The panel's discussion of the "prongs" of the immunity analysis employed by this court in *Saucier v. Katz* is somewhat confusing. The court starts the paragraph (pp. 829) about a second "prong" which it identifies as relating to whether or not a right was "clearly established;" a correct reading of the *Saucier* analysis approach. However, without pause, the discussion turns to the "third prong" of the *Saucier* analysis ("reasonableness"), which to petitioners' understanding of *Saucier*, only occurs after a court has concluded that plaintiffs have conquered prongs one and two.

entirely. The majority stated, "[i]f the [social worker's] mistake as to what the law requires is reasonable,..."the social worker is entitled to absolute immunity" at 205. Clarification from this court is imperative so that this prong of *Saucier* does not become a black hole that swallows reasoned deliberations and allows wholesale denial or disregard for the facts of a case.

In this case, defendant Herrera and the County did not claim they were "mistaken" as to what the law required. Their argument was solely that the examination was done for *treatment purposes*. (Def. Resp. Brief, pp. 41)[10] The question of whether Lacey was referred for a medical, as opposed to investigatory exam, is a question of fact for the jury, but the majority tossed that stumbling block aside.

While that is troubling, far more troubling to the dissent and plaintiffs, was that the majority decision utterly disregarded the admitted fact that Herrera *knew* she did not have a court order. Herrera never raised any issue as to what knew or didn't know in the appeal, as to "what the law required" in terms of obtaining a court order to do an invasive sex abuse examination. She testified she had no court order in deposition. This decision basically says, "ignore reality, for possibility."

Can a society governed by the rule of law justify the outright denial of that which is **fact**, in order to shield a state actor with a judicially created assumption that denies that fact? Petitioners urge this court that this is an unjustifiable usurping of a decidedly jury function – determination of facts. More alarming, the panel majority simply assumes facts to reach its conclusion; facts found nowhere in the record. The majority *assumes* a conversation between the counsel who did attend the initial hearing in the matter, and defendant Herrera, who did not. The majority then *assumes* the content of the *assumed* conversation, and *assumes* the

[10] Additionally, Herrera admitted in deposition that she learned from shelter medical staff the day before she sent the child for the SART exam, that Lacey had *no pain* or *vaginal discharge*.

specificity of the *assumed* conversation, and clearly must *assume* that the county counsel either relayed the courts comments incorrectly, or Herrera didn't hear or understand them correctly; the result was clearly not court ordered! All of this is done in clear contravention, if not in spite, of the requirement that all facts must be viewed in the light most favorable to the Doe plaintiffs.

Petitioners urge this court to consider that allowing such a creative perspective of the application of the second prong in *Saucier* to live on, is to demolish any distinction between "absolute" and "qualified" immunity. The second prong of *Saucier* will become the tail that wags the dog. Civil rights cases will be decided based on a judicial officers personal opinion of what constitutes reasonableness, judges will not be required to acknowledge undisputed *facts* or leave them to the province of a jury, and can deny plaintiffs our most fundamental right, to obtain redress for injury. This will be true even when a state actor *knowingly* acts without a court order to violate clearly established rights as is the case here.

This court could not have intended such results from its decision in *Saucier* and this is an opportunity to address a decision that has now been the subject of numerous District Court and Circuit Court opinions, and provide clarity called for by disparity in such rulings before others suffer.[11]

As this Court is aware, *Saucier* involved an excessive force claim by a protestor against military police who "hurried" plaintiff away from the scene where Vice President

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[11] Sampling of published cases discussing Saucier, see, *Estate of Palma v. Edwards*, 2001 WL 1104716 (N.D.Ill. Sep 19, 2001) (NO. 99 C 4896), *Estate of Torres v. Terhune*, 2002 WL 32107949 (E.D.Cal. Jan 09, 2002) (NO. CIV. S-98-2211WBSGGH), *Mathis v. Best*, 2002 WL 483536 (S.D.Ohio Mar 14, 2002) (NO. 2:99-CV-111), *Alford v. Haner*, 333 F.3d 972, 3 Cal. Daily Op. Serv. 5407, 2003 Daily Journal D.A.R. 6902 (9th Cir.(Wash.) Jun 23, 2003), opining that the holding in *Katz* was based on the idea that police officers will sometimes have difficulty drawing fine legal distinctions under exigent circumstances, which did not apply, *Ehrlich v. Town of Glastonbury*, 348 F.3d 48 (2nd Cir.(Conn.) Oct 17, 2003), *Doe v. Heck* (7th Cir. 2003) 327 F.3d 492.

Gore was speaking and shoved him into the back of a van. Plaintiff suffered no significant injury, and was held for a relatively short period of time. The court stated,

> "a reasonable officer in the petitioner's position could have believed that hurrying respondent away from the scene, where the vice president was speaking and approached the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses." *Id* at 208

> "In carrying out the detention, as it has been assumed the officers had the right to do, petitioner was required to recognize the necessity to protect the Vice President by securing respondent and restoring order to the scene. It cannot be said there was a clearly established rule that would prohibit using the force petitioner did to place respondent into the van to accomplish these objectives". *Id* at 208 – 209.

In this case, as the panel's decision makes clear, at the time of Lacey's examination "*Wallis* was the law of the circuit." [Majority opinion at fn. 11] There can thus be no dispute that the restrictions on the social worker's conduct with regard to invasive sexual abuse evaluations were those enunciated in *Wallis, supra,* and were as clearly established as one can expect.[12]

Unlike the case at bar, the *Saucier* opinion held that there was,

> "no clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule. Our conclusion is

[12] Although a 2000 9th Circuit decision, the underlying removal and invasive sexual abuse evaluation incidents that led to the case occurred in 1991, and the decision relies on prior Supreme Court precedent.

> confirmed by the uncontested fact that the force was not so excessive that the respondent suffered hurt or injury". *Id* at 209.

In *Doe v. Lebbos*, however, there is not only a clearly established rule against such invasive evaluations without court order, parental consent, or exigency, but demonstrably serious and obviously indelible injury.There were no exigent circumstances presented to Herrera from any source other than the arguably insane defendant Lebbos; nothing at all like the circumstances confronting the officers in *Saucier* existed.

The majority of the panel in this case also relied on Welfare & Institutions Code §324.5, but their reliance was misplaced. The section provides that whenever allegations of physical or sexual abuse of a child come to the attention of law enforcement or child welfare personnel, such persons shall, *within 72 hours of the time the child was taken into protective custody,* consult with a medical practitioner who has specialized training in detecting and treating child abuse injuries and neglect to ascertain if such an exam is necessary. If appropriate, the exam must take place either within 72 hours of the time the child was taken into custody, or within 72 hours of the time the allegations were made. Obviously there was no compliance with the time lines, and not a stitch of evidence was submitted that Herrera "consulted" with any medical professional at all. She simply referred Lacey for the examination.

CONCLUSION

The concept of absolute immunity, like any principle intended to govern human affairs, can be perverted and made unconscionable if its application is blind and devoid of reason. It can, and will, breed corruption and unfettered abuse of power if unchecked, and this case is but one of thousands in various stages of litigation across this nation that illustrate this reality all too well. This court has attempted to set reasonably discernable guidelines and guideposts for the inferior courts to follow. However, the

circuit courts' perspectives have varied markedly in an area of law that cries for logical uniformity. A rational application of a functional approach, and reference to the historical immunity exceptions to 42 U.S.C. § 1983 developed by this court can lead to no other conclusion than that absolute immunity does not apply for social workers, just as it does not apply to police officers or other non-prosecutorial state actors. A rational application of the 4th Amendment right to be free from unreasonable searches and seizures, can lead to no conclusion other than one that requires an actual court order before performing an invasive anal and vaginal examination of a small child.

The need for this court to weigh in at this juncture is immediate. Petitioners respectfully urge this court to accept this matter for review and address both of the questions presented;. the appropriate level of immunity for social workers, and the bounds of bodily privacy for innocent children.

From time to time the Supreme Court of this great nation must clarify for those who claim the invincible shield of immunity, that it is not a license to injure, to invade the most private areas of a child's body, or in this case, the blanket over a blunt instrument with which to crush a family.

To this honorable Court, petitioners say, this is one of those times, and respectfully requests the Court accept this matter for review.

Respectfully submitted,

The Law Offices Of
Robert R. Powell

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Robert R. Powell

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GEORGE DOE, individually and as Guardian Ad Litem for LACEY DOE, a minor, Plaintiffs, v. BETSEY WARREN LEBBOS, et al., Defendants.	No. C-00-21274 RMW ORDER GRANTING PARTIAL SUMMARY JUDGMENT REGARDING COUNTY'S § 1983 CLAIM; ORDER TO SHOW CAUSE REGARDING PLAINTIFFS' § 1983 CLAIM AGAINST DEFENDANT LEBBOS; AND ORDER TO SHOW CAUSE WHY ACTION SHOULD NOT BE REMANDED TO STATE COURT [Re Docket No. 45]

This case involves allegations of federal civil rights violations and various state law claims arising out of the placement of plaintiff George Doe's minor child, plaintiff Lacey Doe, in protective custody following allegations that Mr. Doe had abused and neglected her. On November 9, 2001, defendants Lisvet Carrillo-Herrera, the County of Santa Clara, the Santa Clara County Department of Social Services, and Santa Clara County Child Protective Services (collectively, "the County") filed a motion for summary judgment on each cause of action brought against them, namely, the first through fourth, ninth, and tenth causes of action. Plaintiffs opposed the motion, and oral argument was heard on April 5, 2002. For reasons set forth below, the

court grants partial summary judgment in favor of the County with respect to the tenth cause of action for civil rights violations under § 1983 and reserves ruling on the County's motion for summary judgment regarding plaintiff's remaining state law causes of action pending briefing on the court's order to show cause, set forth below, as to why partial summary judgment should not be granted regarding the § 1983 claim against defendant Betsey Warren Lebbos and why this action should not be remanded to state court for lack of federal jurisdiction.

I. BACKGROUND

Lacey Doe is the daughter of plaintiff George Doe and her deceased mother Robin. Mr. Doe and Lacey lived in Miami, Florida, with Mr. Doe's father, Jorge, from 1996 to approximately October 27, 1999. (See Alonso[13] Decl. ¶¶ 3, 10.) During that time, Mr. Doe apparently regularly spoke with defendant Betsey Warren Lebbos and at one point indicated his desire to move to California to rebuild his law practice. (See id. ¶ 8.) Ms. Lebbos invited Mr. Doe and Lacey to live with her, and on or about October 27, 1999, Mr. Doe and then-four-year-old Lacey moved in with Ms. Lebbos in San Jose, California. (See id. ¶¶ 8, 14; Compl. ¶¶ 13, 56, 59.)

Mr. Doe and Ms. Lebbos offer conflicting accounts as to which of them had more severe personal problems. Mr. Doe alleges that Ms. Lebbos was an alcoholic and "an absolute nut" who wanted to take Lacey away from him, whereas Ms. Lebbos alleges that Mr. Doe was an alcoholic, an incapable parent, and a child abuser, among other things. (Compare Alsonso Decl. ¶¶ 9, 14, 17, with Compl. ¶¶ 14-15, 23, 38, 48.) In any event, on October 31, 1999, Mr. Doe moved in with his friend Armando Saladana, and on November 1, returned to Ms. Lebbos's home to pick up his

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[13] Although plaintiff at times maintains the fictitious name "George Doe," his declaration and his opposition brief (see Opp. at 3:3), neither of which was filed under seal, use his real name.

belongings. (See Alonso Decl. ¶ 15.) When Ms. Lebbos would not let him into her house, Mr. Doe placed Lacey in a day care facility and called the San Jose police for assistance. (See id. ¶¶ 16-17.) When the police arrived, Ms. Lebbos gave them a prepared, six-page declaration that, according to Mr. Doe, falsely accused him of being a member in a prison gang called the Aryan Brotherhood, a drug user and addict, an alcoholic, homeless, a child abuser, unemployed, and unable to care for Lacey. (See id. ¶ 17; Compl. ¶¶ 15, 38.) That same day, based on Ms. Lebbos's allegations, the San Jose police removed Lacey from the day care facility and placed her in protective custody. (See Compl. ¶¶ 16, 52, 72, 75.)

Shortly thereafter, Lacey's case was referred to the Santa Clara County Social Services Agency. Defendant Lisvet Carrillo-Herrera was the social worker assigned to Lacey's case. Based on her initial investigation, including a conversation with Mr. Doe, Ms. Carrillo-Herrera filed a Dependency Petition for Lacey in juvenile court. Ms. Carrillo-Herrera claims the Dependency Petition was based on allegations that Mr. Doe neglected to provide food, clothing, shelter, and medical treatment for Lacey and that he had a problem with alcohol that affected his ability to care for Lacey. (See Carrillo-Herrera Decl. ¶ 3.) Ms. Carrillo-Herrera also contends that she considered complaints by Lacey of vaginal pain and discharge, and statements by Mr. Doe that Lacey had two yeast infections. (See id. ¶ 4.) Furthermore, Ms. Carrillo-Herrera allegedly relied on information in the Social Services database indicating that Mr. Doe had been the object of a prior complaint of sexual abuse involving his other children. (See id.)

Mr. Doe contends, however, that the Dependency Petition was based on insufficient evidence and an incomplete investigation of the accusations against him. (See Compl. ¶ 24) Specifically, Mr. Doe alleges that Ms. Carrillo-Herrera refused to consider any exculpatory

evidence he offered to her regarding his ability to clothe and care for Lacey, his explanation of Lacey's vaginal problems for which she was treated, and his account of Ms. Lebbos's "troubled past," including her history of making false accusations, the myriad of lawsuits she filed against judges, courts, and the State Bar, and her disbarment from the California Bar. (See Alonso Decl. ¶¶ 21-23, 25-26.) Mr. Doe also provided Ms. Carrillo-Herrera with documentation of the medical procedure Lacey had undergone at the Miami Children's Hospital for her urinary condition. Mr. Doe admits that those documents were attached to the Dependency Petition but complains that they were not mentioned in Ms. Carrillo-Herrera's report. (See id. ¶ 25.) He additionally denied the accusations that he was a child molester and attempted to offer her proof of his innocence, which Ms. Carrillo-Herrera refused. (See id. ¶¶ 24, 27.)

On November 5, 1999, the juvenile court held a detention hearing regarding Lacey, which Mr. Doe attended and at which he was represented by an attorney. (See 3/25/02 Botha Aff. Ex. E.) The court found that it was proper to detain Lacey and that continued detention was necessary for her safety. (See id. Ex. E at 6:14-23.)

Following the detention hearing, Ms. Carrillo-Herrera continued her investigation of Lacey's case and claims that she received additional information from Mr. Doe's father, Jorge, as well as Lacey's doctor in Florida. (See Carrillo-Herrera Decl. ¶ 7.) Additionally, Ms. Carrillo-Herrera considered a "medically indicated" examination of Lacey based on her complaints suggesting she might have a vaginal infection. (See Ritter Decl. ¶ 8.) The examination did not reveal definite physical evidence of penetrating trauma, but the examiner's report indicated that the possibility of sexual trauma could not be eliminated. (See id. Ex. A.) Ms. Carrillo-Herrera used this information to substantiate the original Dependency Petition.

Mr. Doe, on the other hand, contends that Ms. Carrillo-Herrera, as part of her subsequent "investigation," contacted his friends, relatives, and other persons with the purpose of "creating" a case of child abuse against him. (See Compl. ¶¶ 24-25.) Mr. Doe contends that Ms. Lebbos made additional false child abuse reports against Mr. Doe during that time. (See id. ¶¶ 26, 64.) Mr. Doe further contends that Ms. Carrillo-Herrera knowingly and maliciously made false disclosures to the juvenile court during Lacey's child dependency proceedings. (See id. ¶¶ 25-26, 38-39, 41, 46.) Moreover, Mr. Doe contends that Ms. Carrillo-Herrera maliciously disclosed information about the child dependency proceedings to the public, thereby causing an invasion of his and Lacey's privacy. (See id. ¶¶ 24, 28-29.)

The original Petition filed in the child dependency proceedings contained 11 allegations in support of the court exercising jurisdiction over Lacey, including (1) Mr. Doe's general neglect of Lacey; (2) his problem with alcohol; (3) a 1993 referral alleging that he had sexually abused two other children; (4) Lacey's mother's drug use; (5) past questions as to whether Mr. Doe was Lacey's biological father; (6) allegations that Mr. Doe's father took care of Lacey in Florida; (7) Mr. Doe's failure to provide medical care for Lacey while in Florida; (8) Mr. Doe's sudden relocation from Florida to California without informing his father or making arrangements to provide a home for Lacey; (9) Lacey's mother's death due to a drug overdose; (10) having sexual relations with a woman while his daughter was in the other room; and (11) additional referrals of past sexual abuse. (See 3/25/02 Botha Aff. Ex. B). Ten of these allegations were eventually dropped, however, and the only issue raised in the Second Amended Petition was whether Mr. Doe had a problem with alcohol that rendered him periodically incapable of caring for Lacey. (See id.)

On February 28, 2000, the juvenile court held a jurisdictional hearing. (See 3/25/02 Botha Aff. Ex. A.) The

court sustained the Second Amended Dependency Petition, presumably on the determination that Mr. Doe's problems with alcohol hindered his ability to care for Lacey, and found Lacey to be a dependent of the court. (See Carrillo-Herrera Decl. Ex. D (4/27/00 Minute Or.).) Additionally, Mr. Doe was ordered to proceed with a reunification plan, which he successfully completed in May 2001. (See 3/25/02 Botha Aff. Exs. C-D.) On May 15, 2001, the juvenile court dismissed Lacey as a dependent of the court and placed her back with Mr. Doe. (See id. Ex. D.)

Mr. Doe filed a complaint against Ms. Lebbos, Ms. Carrillo-Herrera, the County of Santa Clara, the Santa Clara County Department of Social Services, Santa Clara County Child Protective Services, and others in Santa Clara County Superior Court. That action was removed to this court on December 20, 2000. The amended complaint, filed on November 9, 2000, sets forth the following ten causes of action: (1) intentional infliction of emotional distress; (2) invasion of privacy; (3) intentional interference with parent-child relations; (4) libel; (5) slander per se; (6) fraud; (7) violation of California Penal Code § 11172 (submitting false child abuse reports); (8) unlawful eviction/forcible detainer; (9) civil conspiracy; and (10) violation of 42 U.S.C. § 1983.

The County seeks summary judgment on the first through fourth, ninth, and tenth causes of action. Plaintiffs oppose the County's motion regarding each cause of action.

II. ANALYSIS

The court first addresses the County's motion with respect to plaintiffs' tenth cause of action for alleged violation of their civil rights under § 1983. The § 1983 claim is the only federal claim set forth in the complaint. Because the court grants partial summary judgment as to that claim, and because it appears that plaintiffs cannot present evidence supporting a § 1983 claim against Ms. Lebbos, there is a question as to whether this court has jurisdiction over plaintiffs' state law claims. Accordingly, the court

reserves ruling on plaintiffs' state law claims pending the parties' responses to the court's order to show cause set forth below.

A. § 1983 Claim

The County seeks a summary judgment regarding plaintiffs' tenth cause of action for violation of 42 U.S.C. § 1983 on the grounds that (1) social workers enjoy absolute immunity from § 1983 claims, (2) plaintiffs cannot prove a Montell claim against the County, and (3) the § 1983 claim is barred under the Rooker-Feldman doctrine. The court finds in favor of the County on all three accounts.

1. Immunity.

The County first argues that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings," citing Meyers v. Contra Costa County Department of Social Services, 812 F.2d 1154, 1157 (9th Cir. 1987). (Mot. At 17:19-27.) Plaintiffs oppose on the grounds that state law rather than federal law applies, that Meyers entitles a social worker to absolute immunity only for actions taken after the institution of judicial proceedings, and that, in any event, social workers are entitled at most to qualified immunity, not absolute immunity. (See Opp. at 21-23.) The court finds that Ms. Carrillo-Herrera is entitled to absolute immunity for her actions in this case.

a. Federal or State Law.

The first issue raised by plaintiffs regarding the County's immunity defense is whether federal or state law applies. In an effort to rely on California Government Code § 820.21 to strip defendants of their immunity, plaintiffs contend that "Federal Courts deciding the issue of immunity for social workers have deferred to the relevant state law in determining whether they are entitled to absolute immunity under 42 U.S.C. § 1983," citing Doe v. County of Suffolk, 494 F.Supp. 179 (E.D.N.Y. 1980). (Opp. at 21:24-22:1.)

Doe v. County of Suffolk, however, does not support plaintiffs' proposition. There, the district court for the Eastern District of New York only held that, under New York's statutory scheme, New York social workers do not exercise sufficient discretion to entitle them to the absolute immunity enjoyed by legislators, judges, and prosecutors. See 494 F. Supp. at 182-83. The absolute immunity considered by the court, however, arose under federal law, not state law. See id. at 180-81 (citing Supreme Court and Second Circuit precedent). Notably, the court held that the defendant social worker in that case was entitled to qualified immunity in the constitutional context of § 1983 but denied the defendants' motions to dismiss and for summary judgment. See id. 183.

In contrast to plaintiffs' suggestion that state law governs the availability of absolute immunity under § 1983, the Ninth Circuit, in Wallis v. Spencer, 202 F.3d 1126, 1144 (9th Cir. 2000), explained: "Immunity under § 1983 is governed by federal law; state law cannot provide immunity from suit for federal civil rights violations." Accordingly, California state law, including California Government Code § 820.21, is not relevant in determining whether the County is immune from liability under § 1983.

b. Absolute vs. Qualified Immunity

Next, the parties dispute whether the absolute immunity recognized for social workers in Meyers applies to Ms. Carrillo-Herrera's actions in this case. The court finds that it does.

In Meyers, the Ninth Circuit held that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings." 812 F.2d at 1157 (emphasis added). As plaintiffs correct suggest, however, the court did limit the scope of this absolute immunity. Specifically, the court explained that a social worker is only entitled to qualified immunity, not absolute

immunity, for actions taken before the initiation of judicial proceedings. See id. In justifying this limitation, the court considered the policy considerations and benefits of absolute immunity for certain decisionmakers and reasoned as follows:

> Nevertheless, the balance might not be struck in favor of absolute immunity were it not for the presence of safeguards built into the judicial process that tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct.
>
> ***
>
> Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error. 812 F.2d 1158

Here, plaintiffs' complaint against Ms. Carrillo-Herrera is based on the alleged false statements she submitted to the juvenile court in her Dependency Petition. Those actions, however, were made in connection with the initiation of judicial proceedings and, therefore, are entitled to absolute immunity. The Dependency Petition was submitted for the purpose of initiating child dependency proceedings and was subject to the judicial safeguards that justify granting absolute immunity to social workers. Indeed, before any allegedly false statements in the Dependency Petition could have had a negative impact on plaintiffs, they would have had to have been considered and adopted by a judge. In fact, all but one of the allegedly false allegations in the original Dependency Petition were stricken before the juvenile court made its jurisdictional decision. These judicial safeguards

are the very reason why social workers, such as Ms. Carrillo-Herrera, enjoy absolute immunity.

Furthermore, the Meyers decision describes the kind of conduct occurring before the initiations of judicial proceedings that is not entitled to absolute immunity, conduct that is distinguishable from the facts of this case. In Meyers, the defendant social worker, prior to initiating judicial proceedings, ordered the plaintiff father to stay away from his home until after the hearing before the juvenile court. See 812 F.2d at 1157. That conduct was not subject to judicial approval and had an immediate adverse impact on the plaintiff. As such, the court afforded the social worker only qualified immunity (which the court nevertheless held was sufficient to shield the social worker from liability). See id. at 1158. Here, however, Ms. Carrillo-Herrera took no actions against plaintiffs that had an immediate impact on plaintiffs prior to the initiation of judicial proceedings. Her actions were subject to review and adoption by the juvenile court before plaintiffs could have been affected. Therefore, Ms. Carrillo-Herrera is entitled to absolute immunity for her actions in this case.[14]

2. Plaintiffs' Monell Claim

The County also argues that plaintiffs have not alleged in the complaint, and cannot show by evidence, a basis for Monell liability against the County entity defendants. (See Mot. at 20:8-21:24.) Proving Monell liability requires showing that the County adopted a "policy or custom," or engaged in "persistent and widespread discriminatory practices," that caused the alleged constitutional violation. See Monell v. Dep't of Soc. Servs.,

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[14] Plaintiffs also argue that the County violated Lacey's right to privacy by conducting a medical examination of her vaginal area without parental approval or court order. (Opp. at 11:3-13:4.) The record indicates, however, that the examination followed the juvenile court's express direction that Lacey's medical condition be treated. (See 3/25/02 Botha Aff. Ex. E at 4:8-16.)

98 S. Ct. 2018, 2036-38 (1978). In opposition, plaintiffs argue that "the policy, custom and practice of the County included the failure to conscientiously conduct training of its employees." (Opp. at 18:16-19.) The only evidence plaintiffs offer in support of this assertion, however, is the testimony of Ms. Carrillo-Herrera that "she doesn't remember if she received any State of [sic] Federal cases as part of her training." (Opp. at 20:4-6.) This purported evidence falls well short of showing that the County adopted a policy or custom of failing to adequately train its employees.[15] Merely because Ms. Carrillo-Herrera cannot remember if she personally ever received any case law as part of her training would not allow a reasonable fact finder to conclude that it was the County's policy or custom, or persistent and widespread practice, not to train its social workers.

Apparently recognizing their lack of sufficient evidence to sustain their burden in opposing summary judgment, plaintiffs, for the second time, have requested the opportunity to conduct additional discovery. Plaintiffs' request is denied. First, plaintiffs have not filed a proper motion under Rule 56(f) and have not submitted an affidavit, as required under Rule 56(f), showing that they cannot present facts essential to justify their opposition. Second, the court previously granted plaintiffs the opportunity to conduct further discovery and to submit a replacement opposition brief in response to the County's motion (after the County filed its reply brief to plaintiffs' original opposition brief). (See 2/7/02 Order Granting Plaintiffs' Motion for Continuance of Summary Judgment Hearing to Allow for

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[15] The purported excerpts of the deposition transcript of Ms. Carrillo-Herrera appear to have been retyped by plaintiffs and are not properly authenticated. See Orr v. Bank of Am., NT & SA, No. 00-16509, 2002 WL 338141, at *3-*4 (9th Cir. Mar. 5, 2002). Even assuming the excerpts were properly authenticated, however, the court nevertheless would reach the same conclusion.

Discovery and Re-briefing of Opposition to Defendants' Motion for Summary Judgment.) Because plaintiffs failed to exercise the opportunity the court previously afforded them, the court will not now further delay the resolution of this matter.

Additionally, the court denies plaintiffs' "Request for Judicial Notice of Fryer v. County of Santa Clara Case Number C-01 20583." In an attempt to show that the County has engaged in similar "arrogant acts of non-investigation" in other cases, plaintiffs ask the court to take judicial notice of the allegations set forth in a complaint. (See Opp. at 20:11-16.) The unverified allegations in a complaint filed in a separate case, however, are not a proper subject for judicial notice. See Fed. R. Evid. 201(b).

Furthermore, plaintiffs claim that another case will be filed shortly showing the County's policy and procedure of engaging in wrongful conduct. (See Opp. at 20:17-25.) Again, plaintiffs' speculation that another plaintiff may in the future file a complaint containing nothing more than allegations of misconduct is insufficient to sustain their burden of opposing summary judgment under Rule 56(e).

Finally, the opposition brief filed by defendant Lebbos is unpersuasive. The County argues that the court should not consider Ms. Lebbos's opposition brief in that it is untimely, inappropriate, and filed without leave of court. (See Reply at 1-2.) It is unnecessary to address the County's arguments, however, because even if Ms. Lebbos's opposition brief were properly filed, it nonetheless is not persuasive. Ignoring for now whether the excerpts from Ms. Carrillo-Herrera's deposition transcript, submitted with Ms. Lebbos's opposition brief, were properly authenticated, Ms. Carrillo-Herrera's testimony at most only shows that Ms. Carrillo-Herrera conducts an initial investigation before determining whether to file a dependency petition and then may conduct further investigation after filing the petition. (See Lebbos Opp. at 2-3.) Ms. Carrillo-Herrera consistently

maintained that she always conducted an investigation and that her investigation in this case adequately substantiated her decision to file a petition. (See id.) Furthermore, the Ninth Circuit, in Meyers, explained that a preliminary investigation is sufficient in these situations:

> The social worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. 812 F.2d at 1157.

Thus, Ms. Lebbos's opposition does nothing more than show that Ms. Carrillo-Herrera's conduct in this case is consistent with conduct expressly approved of by the Ninth Circuit. Accordingly, Ms. Lebbos's opposition, even if properly filed with the court and substantiated by properly authenticated evidence, nevertheless does not warrant denying the County's motion.

3. The Rooker-Feldman Doctrine

Finally, the County argues that plaintiffs' § 1983 claim is barred by the Rooker-Feldman doctrine. The court agrees. The Rooker-Feldman doctrine precludes federal district courts from engaging in what is essentially appellate review of state-court determinations of federal questions or to evaluate constitutional claims "inextricably intertwined" with a state-court judgment. See Rooker v. Fidelity Trust Co., 44 S. Ct. 149, 150 (1923); D.C. Court of Appeals v. Feldman, 103 S. Ct. 1303, 1315-16 & n. 16 (1983). The Rooker-Feldman doctrine applies even when the state-court judgment is not made by the highest state court, and when the challenge to the state court's decision involves federal constitutional issues. See Dubinka v. Judges of Superior Court, 23 F.3d 218, 221 (9th Cir. 1994).

Here, the juvenile court determined that adequate grounds existed for exercising jurisdiction over Lacey from

November 1, 1999 until she was returned to Mr. Doe on May 15, 2001. (See Carrillo-Herrera Decl. Ex. D (4/27/00 Minute Or.).) For this court now to determine that Mr. Doe's and Lacey's Fourth Amendment rights and right to family association were violated by Lacey's removal from Mr. Doe's custody effectively would require this court to disagree with and overturn the juvenile court's decision that it was proper to take Lacey into protective custody. The Rooker-Feldman doctrine denies this court subject matter jurisdiction to make such a determination.[16] Any challenge to the juvenile court's decision would properly be made through the state court appellate system, not in federal district court. Accordingly, plaintiffs' § 1983 claim is barred by the Rooker-Feldman doctrine.

B. Federal Jurisdiction

Plaintiffs' § 1983 claim, as set forth in the tenth cause of action, is the only federal claim in this action. Its resolution deprives this court of jurisdiction to adjudicate plaintiffs' remaining state law claims. Because the court grants partial summary judgment in favor of the County regarding plaintiffs' § 1983 claim, the only remaining federal claim in this action is plaintiffs' § 1983 claim against Ms. Lebbos. The court previously denied defendant Lebbos's motion to dismiss the § 1983 claim against her. (See 9/18/02 Order Granting in Part and Denying in Part Defendant Betsey Warren Lebbos' Motion to Dismiss.) In light of the court's findings above, however, and the facts presented by plaintiffs in response to the County's motion for summary judgment, the court questions whether plaintiffs can present evidence necessary to sustain an action against Ms. Lebbos under § 1983. Therefore, the parties are

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[16] Additionally, because the juvenile court had a sufficient basis for taking Lacey into protective custody (presumably its determination that Mr. Doe's problems with alcohol periodically hindered his ability to care for Lacey), plaintiffs cannot recover damages for the alleged wrongful seizure of Lacey and interference with family associational rights.

ordered to show cause why partial summary judgment should not be entered in favor of Ms. Lebbos regarding the § 1983 claim. Furthermore, if partial summary judgment is entered in favor of Ms. Lebbos regarding the § 1983 claim, the parties are ordered to show cause why this action should not be remanded to state court for lack of federal jurisdiction.

III. ORDER

For the foregoing reasons, the court grants partial summary judgment in favor of the County regarding plaintiffs' tenth cause of action for civil rights violations under 42 U.S.C. § 1983. The parties are ordered to show cause why partial summary judgment should not be entered in favor of Ms. Lebbos regarding the § 1983 claim. Additionally, the parties are ordered to show cause why this action should not be remanded to state court for lack of federal jurisdiction in the event partial summary judgment is entered in favor of Ms. Lebbos regarding the § 1983 claim. Plaintiffs shall file a brief addressing these two issues by no later than Friday, April 26, 2002. The defendants may respond by no later than May 3, 2002. If necessary, the court will set a date for oral argument after reviewing the parties' briefs.

Dated: 4/12/02

/s/
RONALD M. WHYTE
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GEORGE DOE, individually and as Guardian Ad Litem for LACEY DOE, a minor, Plaintiffs, v. BETSEY WARREN LEBBOS, et al., Defendants.	No. C-00-21274 RMW ORDER DENYING REQUEST FOR CONTINUANCE, GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF LEBBOS REGARDING § 1983 CLAIM, AND REMANDING ACTION TO STATE COURT

On April 12, 2002, the court issued an order to show cause why partial summary judgment should not be entered in favor of Ms. Lebbos regarding plaintiffs' § 1983 claim and why this action should not be remanded to state court for lack of federal jurisdiction in the event partial summary judgment were entered in favor of Ms. Lebbos regarding the § 1983 claim. On April 26, 2002, plaintiffs filed the Declaration of Robert R. Powell in Support of Continuance of Order to Show Cause re: Betsey Lebbos to Allow For Discovery. The County defendants filed a response to the Powell Declaration on May 6, 2002.

The court denies plaintiffs' request for a continuance to conduct further discovery. Plaintiffs have failed to set

forth any facts suggesting that Ms. Lebbos acted in the capacity of a state actor such that she could be liable under § 1983 or otherwise explained why they cannot oppose partial summary judgment regarding the § 1983 claim. See Fed. R. Civ. P. 56(f). Although plaintiffs' counsel claims he was denied the opportunity to conduct discovery, in particular the opportunity to depose Ms. Lebbos, the court has been unable to locate any order precluding the discovery plaintiffs' counsel seeks to take. In any event, there is no indication of what facts might be developed to show that Ms. Lebbos acted under color of state law. In fact, the evidence submitted in this case thus far, including Mr. Doe's own declaration, shows that Ms. Lebbos's involvement in this case was limited to the submission of information to the police regarding Mr. Doe's alleged child neglect and other personal problems. Even if such information were false, as plaintiffs allege, plaintiffs would not have a § 1983 claim against Ms. Lebbos. The Ninth Circuit has explained that complaining to the police, even if such complaint forms the basis for an arrest, is not enough to convert a private party's act into state action. See Rivera v. Green, 775 F.2d 1381, 1384 (9th Cir. 1985). Plaintiffs have not suggested that they might obtain evidence showing that Ms. Lebbos's conduct goes beyond merely complaining to the police or that she otherwise acted under color of state law. Accordingly, the court grants partial summary judgment in favor of Ms. Lebbos regarding plaintiff's § 1983 claim against her. Furthermore, because there are no remaining federal claims, this action, except for the pending sanctions motion, is remanded to the Santa Clara County Superior Court for adjudication of plaintiffs' remaining state law claims against defendants.

Dated: 5/23/02

/s/

RONALD M. WHYTE
United States District Judge

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE DOE, individually and as Guardian Ad Litem; LACEY DOE, a minor,

Plaintiffs-Appellants,

v.

No. 02-16326

BETSEY WARREN LEBBOS; LISVET CARRILLO-HERRERA; AIDA MADELINE LEBBOS; AIDA LEBBOS TRUST; COUNTY OF SANTA CLARA; SANTA CLARA COUNTY DEPARTMENT OF SOCIAL SERVICES; SANTA CLARA COUNTY CHILD PROTECTIVE SERVICES,

DC No. CV-00-21274 RMW-PVT

OPINION

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted March 11, 2003*
San Francisco, California
Filed November 4, 2003
Before: Pamela Ann Rymer, Andrew J. Kleinfeld, and
Richard A. Paez, Circuit Judges.
Opinion by Judge Paez;
Dissent by Judge Kleinfeld

*This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Doe v. Lebbos

COUNSEL

Robert R. Powell, Law Offices of Robert R. Powell, San Jose, California, for the plaintiffs-appellants.

Ann Miller Ravel, County Counsel, Winifred Botha, Lead Deputy County Counsel, Office of the County Counsel, San Jose, California, for the defendants-appellees.

OPINION

PAEZ, Circuit Judge:

George and Lacey Doe (the "Does") appeal from the district court's summary judgment on their 42 U.S.C. § 1983 claims in favor of Lisvet Carrillo-Herrera ("Herrera"), a county social worker, and the County of Santa Clara, the Santa Clara County Department of Social Services, and Santa Clara County Protective Services (together the "County").

The Does contend that Herrera and the County violated their constitutional rights by removing Lacey, a four-year-old girl, from George's custody, inadequately investigating allegations that George abused and neglected Lacey, fabricating evidence in support of the dependency petitions they filed in dependency court, and referring Lacey for a sexual abuse examination without parental consent or a court order. The district court granted absolute immunity to Herrera, reasoning that her actions were part of the initiation and pursuit of child dependency proceedings for which social workers are entitled to absolute immunity. The court also concluded that there was no basis for *Monell* liability against the County.

We agree with the district court that the Does' *Monell* claim against the County must fail because there was no evidence that Herrera was a final decisionmaker for the County, that the County failed adequately to train its social workers, or that the County deliberately deprived the Does of their constitutional rights. We also agree with the district

court that Herrera is entitled to immunity for her actions, but we disagree that she is entitled to absolute immunity across the board. Instead, we hold that Herrera's actions in allegedly failing to investigate adequately the allegations of abuse and neglect against George and in allegedly fabricating evidence in the dependency petitions she prepared for the court were part of the initiation and pursuit of child dependency proceedings, for which Herrera was entitled to absolute immunity. She is entitled only to qualified immunity, however, for her actions in maintaining Lacey outside of George's custody pending the November 5, 1999, detention hearing and in referring Lacey for a sexual abuse examination without parental consent or a court order. In light of our disposition of the immunity issue, we affirm the district court's summary judgment in favor of Herrera and the County.

FACTUAL BACKGROUND

Lacey Doe is the four-year-old daughter of George Doe and Robin Doe.[1] On November 2, 1999, the San Jose Police Department detained Lacey and placed her in a children's shelter on the basis of allegations made by Betsey Lebbos ("Lēbbos")[2]—an acquaintance of George's with whom he and Lacey lived for approximately one week after they moved to San Jose, California, from Miami, Florida—that, among other things, George had been drunk while caring for Lacey, had generally neglected her (i.e., failed to provide her with adequate food, shelter, and medical care), and that Lacey complained of vaginal pain and discharge.

On November 4, 1999, Herrera, a county social worker, was assigned to Lacey's case. With Herrera's assistance, Santa Clara County Social Services prepared a juvenile

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[1] Robin Doe died in a car accident on June 20, 1999. She did not have custody of or contact with Lacey for several years prior to her death due to a substance abuse problem.

[2] The relationship between George and Lebbos was troubled at best. There are many facts in the record about their tumultuous relationship that we do not recount here because they are not relevant to this appeal.

dependency petition, pursuant to California Welfare & Institutions Code section 300, in preparation for Lacey's detention hearing the following day. The report included failure to protect and sexual abuse allegations based in part (1) on evidence of general neglect as reported by the San Jose Police Department, (2) on George's alcohol problem and his failure to provide appropriate care when under the influence of alcohol, (3) on inconsistent statements made by George and Lacey's pediatrician regarding whether Lacey received medical treatment for a urinary tract infection, (4) on Lacey's complaints of vaginal pain and discharge (which appeared to be untreated), (5) on information that Lacey had redness around her vaginal area for which there was no reasonable explanation, (6) on reports that Lacey previously had two yeast infections, and (7) on a prior complaint against George in Santa Cruz County alleging that he sexually abused one of his other daughters.[3]

The dependency court held a detention hearing on November 5, 1999. At the hearing, the judge explicitly asked the County's attorney "if Lacey [was] getting some physical treatment at the shelter for her vaginal infection." The attorney responded that she would contact Herrera and check into treatment for Lacey. The judge then commented, "All right. Because that's very important because she has been complaining that it's painful." At the conclusion of the hearing, the judge decided that "on the face of the [dependency] petition a showing has been made that [Lacey] comes within section 300." The judge therefore detained Lacey and placed her under the supervision of the Department of Family and Children's Services. She also granted George supervised visitation rights.

Due in significant part to the judge's inquiry about Lacey's condition, as well as evidence of sexual abuse against Lacey, Herrera referred Lacey on November 10,

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[3] On December 6, 1999, Herrera learned that this complaint was unfounded.

1999, to the Santa Clara Valley Medical Center, Center for Child Protection, for a sexual abuse examination. She did not have parental consent or a formal court order authorizing the examination. Mary Ritter, a certified physician's assistant, performed a physical examination, including a Sexual Assault Response Team ("SART") examination,[4] on Lacey to determine whether she had a vaginal infection and whether there were signs of sexual abuse. Ritter found "[n]o definite evidence of penetrating trauma," but concluded that the "absence of definite physical evidence of penetrating trauma by no means rules out the possibility of prior sexual contact."

The dependency court held a contested jurisdictional hearing on February 28, 2000.[5] George admitted the allegation of neglect, which was based on his alcohol use, and knowingly and intentionally waived his right to a trial. The judge then declared Lacey a dependent of the court and ordered George to participate in a family reunification plan. Lacey remained out of George's custody until May 15, 2001, when George completed the family reunification services.

After Lacey was once again in his custody, George filed suit in California Superior Court, on behalf of himself and Lacey, against the County, Herrera, and Lebbos. In his amended complaint, filed on November 9, 2000, he alleged

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[4] Ritter stated in her declaration: "Whenever a minor as young as Lacey Doe (i.e., a four year-old) is brought to me with complaints that may be symptomatic of a vaginal infection, I always perform a SART examination, regardless of whether the complaints indicative of a vaginal infection are accompanied by allegations of sexual abuse or molestation."

[5] Before this hearing, Herrera twice amended the dependency petition she filed with the court to reflect new information she gathered upon further investigation into Lacey's case. The second amended petition was before the court at the February 28 hearing. The parties stipulated at the hearing that the only allegation the court should consider in deciding proper custody for Lacey was whether George "has a problem with alcohol which periodically renders him incapable of caring for [Lacey]."

nine state causes of action[6] and one federal cause of action[7], all related to the removal of Lacey from his care and custody. The defendants removed the action to federal court on December 20, 2000. On April 12, 2002, the district court granted summary judgment in favor of the County and Herrera on the Does' § 1983 claim. The court reasoned that Herrera was entitled to absolute immunity because her actions involved the initiation and pursuit of child dependency proceedings and that the Does had not provided a basis for *Monell* liability against the County. In addition, the court held that the Does' § 1983 claim was barred by the *Rooker-Feldman* doctrine. The judge also ordered the parties to show cause why he should not issue partial summary judgment in favor of Lebbos and why the case should not be remanded to state court for lack of federal jurisdiction in the event he entered partial summary judgment in favor of Lebbos.

On May 23, 2002, the district court granted summary judgment in favor of Lebbos on the Does' § 1983 claim because the Does failed to present any facts showing that Lebbos was acting in the capacity of a state actor. In addition, the judge remanded the state claims to state court because there were no remaining federal claims before the court.

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[6] The nine state causes of action were: intentional infliction of emotional distress, invasion of privacy, intentional interference with parent-child relations, libel, slander *per se*, fraud, violation of California Penal Code § 11172, unlawful eviction/forcible detainer, and civil conspiracy.

[7] George alleged, pursuant to 42 U.S.C. § 1983, that the defendants violated Lacey's Fourth Amendment rights and her right to privacy in her body, his right to rear, guide, and protect his family, and both his and Lacey's right to be free from unwarranted governmental intrusion into their family and their right to privacy in their family relations.

The Does appeal from the district court's summary judgment in favor of Herrera and the County.[8]

STANDARD OF REVIEW

We review *de novo* the district court's summary judgment. *Mabe v. San Bernardino County*, 237 F.3d 1101, 1106 (9th Cir. 2001). Whether Herrera is entitled to immunity also is a question of law that we review *de novo*. *See id.*

DISCUSSION

I.

[1] We address first whether the district court properly concluded that Herrera was entitled to absolute immunity for her actions in detaining Lacey prior to the initiation of child dependency proceedings, investigating the allegations of abuse and neglect and presenting evidence to the dependency court, and referring Lacey for a sexual abuse examination without a court order or parental consent. In making this determination, we apply a "functional approach." *See Buckleyv. Fitzsimmons*, 509 U.S. 259, 269 (1993); *Miller v. Gammie*, 335 F.3d 889, 898 (9th Cir. 2003) (en banc). That is, we look at the "nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269. State actors, including social workers, who perform functions that are "critical to the judicial process itself" are entitled to absolute immunity. *Miller*, 335 F.3d at 896 (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). "Beyond those functions historically recognized as absolutely immune at common law, qualified and only qualified immunity exists." *Id.* at 897.

We conclude that Herrera is entitled to absolute immunity for her actions in investigating and presenting evidence to the dependency court and that she is entitled to qualified immunity for her other challenged actions.

A.

[2] The Does contend that Herrera both failed to investigate

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[8] The Does do not appeal the district court's summary judgment in favor of Lebbos.

possible exculpatory evidence and fabricated evidence in the dependency petitions she submitted to the dependency court. Herrera, however, engaged in these actions as part of her initiation and pursuit of child dependency proceedings—she filed a dependency petition in state court on November 4, 1999, and dependency proceedings were held on November 5, 1999. Herrera's actions therefore had the "requisite connection to the judicial process" to be protected by absolute immunity. *Miller*, 335 F.3d at 896.

[3] Indeed, in *Meyers v. Contra Costa County Department of Social Services*, 812 F.2d 1154, 1157 (9th Cir. 1987), we recognized that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings." *See also Imbler*, 424 U.S. at 416, 431 & n.34 (holding that prosecutors are entitled to absolute immunity "in initiating a prosecution and in presenting the State's case," even where the prosecutor willfully used perjured testimony and willfully suppressed exculpatory information at trial); *Miller*, 335 F.3d at 898; *Mabe*, 237 F.3d at 1109 (holding, where there were allegations that social workers did not conduct their investigation properly and submitted false evidence during juvenile court proceedings, that the social workers were entitled to absolute immunity because their actions were part of the initiation and pursuit of dependency proceedings).

B.

[4] We next address Herrera's actions in detaining Lacey prior to the child dependency proceedings and referring Lacey for a medical sexual abuse examination without a court order or parental consent. Under *Saucier v. Katz*, 533 U.S. 194, 200 (2001), we must ask whether, viewed in the light most favorable to the Does, the facts alleged show that Herrera's actions violated a constitutional right. If they did, then we next must ask whether the constitutional right was "clearly established" such that it would have been clear to a reasonable social worker in Herrera's position that her conduct was unlawful. *Id.* at 201-02. This second inquiry

"must be undertaken in light of the specific context of the case, not as a broad general proposition. . . ." *Id.* at 201.

1. Detention of Lacey

The Does contend that Herrera violated their right to family privacy, George's right to raise Lacey without governmental interference, and Lacey's Fourth Amendment rights by detaining Lacey prior to the initiation of dependency proceedings.[9] The San Jose Police Department detained Lacey and placed her in a children's shelter on November 2. Herrera was not involved in any way with this initial detention. *Cf. Mabe*, 237 F.3d at 1105 (police officer *and* social worker removed child from her home without a warrant). The Does argue that Herrera violated their constitutional rights by maintaining Lacey in protective custody between the time of her initial detention by the San Jose Police Department on November 2 and the time of the detention hearing on November 5.

[5] We made clear in *Mabe* that the "constitutional right of parents and children to live together without governmental interference is clearly established." 237 F.3d at 1107; *see also Ram v. Rubin*, 118 F.3d 1306, 1311 (9th Cir. 1997). "The Fourth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies." *Mabe*, 237 F.3d at 1107; *see also Wallis*, 202 F.3d at 1138 ("Officials may remove a child

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[9] In *Wallis v. Spencer*, 202 F.3d 1126, 1137 (9th Cir. 2000) (as amended), we addressed parents' and children's claims that the children in that case unlawfully were seized and removed from their parents' custody.

We recognized that the "claims of the parents in this regard should properly be assessed under the Fourteenth Amendment standard for interference with the right to family association." *Id.* at 1137 n.8. Moreover, "[b]ecause only the children were subjected to a seizure, their claims should properly be assessed under the Fourth Amendment." *Id.* Because we applied the same legal standard in evaluating Fourth and Fourteenth Amendment claims, we analyzed the parents' and the children's claims together in *Wallis*. *Id.* We do the same here.

from the custody of [his or her] parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury."). We must determine whether Herrera's action in maintaining Lacey in temporary protective custody pending her detention hearing violated the Does' constitutional rights.

We conclude that it did not.

[6] Herrera had reasonable cause to believe that Lacey was neglected or abused and therefore in imminent danger.[10] Indeed, in the initial dependency petition she submitted to the court, Herrera recommended continued detention for Lacey. She found that "[t]here is substantial danger to the physical health of the minor or the minor is suffering from severe emotional damage, and there are no reasonable means by which the minor's physical or emotional health may be protected without removing the minor from the parent's or guardian's physical custody." She based this finding in part on the redness observed around Lacey's vaginal area, Lacey's complaints of vaginal pain and her vaginal discharge, and George's alleged alcohol abuse and general neglect of Lacey.

[7] Lacey's case qualified as an "emergency" situation. Under our precedent, Herrera therefore did not violate the Does' constitutional right to family privacy, George's right to family association, or Lacey's Fourth Amendment rights by detaining Lacey until the November 5 hearing. *See Wallis*, 202 F.3d at 1138; *Ram*, 118 F.3d at 1311 ("A state official cannot remove children from their parents *unless* the official has a reasonable belief that the children are in imminent danger.") (emphasis added); *see also* Cal. Welf. & Inst. Code § 305(a) (requiring that a peace officer have

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[10] The dependency court judge noted at Lacey's November 5 detention hearing that "the lack of effort to maintain the child in the home was reasonable due to the emergency nature of the removal."

"reasonable cause" for believing that a minor has been abused or neglected in order to take the minor into temporary custody); *id.* § 328 (stating that a social worker who has cause to believe that a child has been physically or sexually abused or neglected "shall immediately make any investigation he or she deems necessary to determine whether child welfare services should be offered to the family and whether proceedings in the juvenile court should be commenced").

In addition, Herrera complied with relevant California law regarding the removal and detention of children when there are allegations of abuse or neglect. Under California Welfare & Institutions Code section 306(a)(1), a social worker, like Herrera, in a county welfare department may "[r]eceive and maintain, pending investigation, temporary custody of a minor who is described in section 300, and who has been delivered by a peace officer." When a peace officer, such as the San Jose police officers here, places a minor in protective custody, however, "such minor shall be released within 48 hours after having been taken into custody, . . . *unless within said period of time a petition to declare [her] a dependent child has been filed.* . . ." Cal. Welf. & Inst. Code § 313(a) (emphasis added). Herrera filed a dependency petition on November 4, within 48 hours of the police detaining Lacey. *See Jenkins v. County of Orange*, 212 Cal. App. 3d 278, 285 (1989) (holding that social worker's detention of child between the time the child initially was taken into custody and the time of the detention hearing "was under legal authority" because the social worker filed a dependency petition within 48 hours after the child was taken into custody, as required by California Welfare & Institutions Code § 313). She also informed George of the allegations against him and provided him with notice of the detention hearing, which he attended. *See* Cal. Welf. & Inst. Code §§ 302(b) & 307.4(a) (requiring that parents be notified of all proceedings involving their child and of their procedural rights).

[8] We therefore conclude, under the first *Saucier* prong,

that the Does have not alleged a constitutional violation of their right to family privacy, George's Fourteenth Amendment right to family association, or Lacey's Fourth Amendment rights. Herrera maintained Lacey in temporary protective custody for the statutorily prescribed amount of time, had reasonable cause to believe that Lacey had been neglected or abused, and provided George with notice of the allegations against him and of the November 5 hearing. As a result, Herrera is entitled to qualified immunity with respect to this claim.

2. Referral for a Medical Examination

The Does contend that Herrera violated Lacey's right to privacy and George's right to guide, rear, and protect Lacey by referring Lacey for an intrusive sexual abuse examination without parental consent or a court order. We conclude that, although the Does have alleged a violation of a constitutional right, Herrera nonetheless is entitled to qualified immunity because it would not have been clear to a reasonable social worker in Herrera's position that her action was unlawful. *See Saucier*, 533 U.S. at 202 ("If the law did not put the [social worker] on notice that [her] conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.").

We note that the parties did not brief the issue of whether Herrera's alleged actions, if proven, violated a constitutional right. We are obligated under *Saucier*, however, to address this issue at the outset of our qualified immunity analysis.

[9] In *Wallis*, 202 F.3d at 1141,[11] we recognized that the "right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." We agreed with the Second Circuit that the "Constitution assures parents that, in the absence of parental

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[11] *Wallis* was the law of the circuit at the time Herrera referred Lacey for a sexual abuse examination. *See Wallis v. Spencer*, 193 F.3d 1054 (9th Cir. 1999). We refer, however, to the amended version of *Wallis*, which did not alter the reasoning in our original opinion

consent, [physical examinations] of their child may not be undertaken for investigative purposes at the behest of state officials unless a judicial officer has determined, upon notice to the parents, and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances." 202 F.3d at 1141 (quoting *van Emrik v. Chemung County Dep't of Soc. Servs.*, 911 F.2d 863, 867 (2d Cir. 1990)) (internal quotation marks omitted; alteration in original). We recognized only two exceptions to the constitutional requirements of parental consent or a court order: "a reasonable concern that material physical evidence might dissipate" or "that some urgent medical problem exists requiring immediate attention." *Id.*

[10] Herrera did not obtain parental consent or a court order before referring Lacey for a medical sexual abuse examination. Indeed, George claims that he was not aware that Lacey was to be examined. In addition, there was no risk here of losing crucial evidence and, although it needed promptly to be treated, Lacey's medical condition was not an "urgent" problem requiring "immediate attention." We therefore hold, consistent with our reasoning in *Wallis*, that, on the Does' version of the facts, Herrera violated the Does' constitutional rights to family association and procedural due process.[12] The Does adequately have alleged a constitutional violation under the first *Saucier* prong.

[11] Our inquiry, however, does not end here. We next must determine whether the constitutional rights at issue were "clearly established" such that it would have been clear

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[12] We note that nowhere in their brief do the County defendants argue that Herrera did not violate the Does' constitutional rights in referring Lacey for a sexual abuse examination. The County argues that the examination was medically necessary due to Lacey's complaints about pain and discharge and that Herrera referred Lacey to the Santa Clara Valley Medical Center for purely medical reasons. We must view the facts in the light most favorable to the Does, however, who contend that Herrera referred Lacey specifically for a sexual abuse examination and not for medical reasons.

to a reasonable social worker in Herrera's position that her conduct was unlawful. *See Saucier*, 533 U.S. at 202. *Saucier* makes clear that "[i]f the [social worker's] mistake as to what the law requires is reasonable, . . . the [social worker] is entitled to the immunity defense." *Id.* at 205. Indeed, the Supreme Court cautioned against the use of 20/20 hindsight "in favor of deference to the judgment of reasonable [social workers] on the scene." *Id.* We conclude that a reasonable social worker in Herrera's position would have believed that she had an appropriate court order authorizing the examination and that her conduct was lawful. Herrera therefore is entitled to qualified immunity.

[12] The dissent argues that granting qualified immunity to Herrera does not comport with *Wallis* because Herrera did not have a formal court order (although she had time to acquire one) authorizing a sexual abuse examination for Lacey. We disagree. Under the unique facts of this case, Herrera reasonably could have believed that she had the requisite court order authorizing the examination. Moreover, *Wallis* is distinguishable from this case.

The following exchange occurred between the judge and the County's attorney, Ms. Warsaw,[13] at Lacey's November 5 detention hearing:

> Court: Miss Warsaw, do you know if Lacey is getting some physical treatment at the shelter for her vaginal infection?
>
> Ms. Warsaw: I don't know, Your Honor. I did intend to ask the social worker that this morning. She was not here, and I did not get the opportunity to call her, but I will be checking into that.
>
> Court: All right. Because that's very important because she has been complaining

[13] Herrera was not present at the November 5 hearing.

that it's painful.

Ms. Warsaw: Yes.

Herrera stated in her declaration that she referred Lacey to the Santa Clara Valley Medical Center "based on the court's inquiry at the hearing on November 5, 1999, as to whether Lacey Doe was receiving medical treatment for her vaginal infection." It is true, as the dissent points out, that Herrera did not have a formal, written order authorizing Lacey's sexual abuse examination, but an objective social worker in Herrera's position, who was told by the County's attorney that the dependency judge specifically inquired about treatment for Lacey, reasonably could have believed that she had the necessary authorization from the court to refer Lacey for an examination. She therefore would not have believed that it was necessary to obtain a written order from the court in the days prior to the examination. This is especially true in light of the fact that Lacey was declared a dependent of the court and the court was responsible for ensuring that Lacey received appropriate care. We agree with the dissent that Herrera's belief was mistaken in light of *Wallis*, but we conclude that the mistake was a reasonable one because, under the unique circumstances here, it would not have been clear to a reasonable social worker in Herrera's position that her actions were unlawful.[14] *See Saucier*, 533 U.S. at 205-06.

The dissent relies exclusively on *Wallis*, but *Wallis* is distinguishable from the facts in this case. In *Wallis*, a police

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[14] We also note that California law today and in force at the time Herrera referred Lacey for the sexual abuse examination permits local child welfare departments to seek physical examinations of children when there are allegations of sexual abuse. *See* Cal. Welf. & Inst. Code § 324.5. It is unclear from the record whether Herrera referred Lacey for an examination on the basis of § 324.5, but we must assume that she was aware of this law, just as we must assume that she was aware of *Wallis*, at the time she ordered the examination.

detective referred the children for sexual abuse examinations without parental consent or a court order, 202 F.3d at 1134-35, even though there were *no* allegations of sexual abuse against the children's parents, *id.* at 1143 (noting "the absence of any individualized suspicion of sexual abuse"). At the time of the examinations, a dependency petition had not been filed with the court and the children had not yet been declared dependents or placed in protective custody. *Id.* at 1134-35. In contrast, at the time Herrera referred Lacey for an examination, she had filed a dependency petition with the court that included sexual abuse allegations and the court had declared Lacey a dependent. The court was responsible for monitoring Lacey's care and specifically inquired about treatment for Lacey's vaginal problems. Moreover, Lacey showed signs of needing medical attention—she complained of vaginal pain, experienced vaginal discharge, previously had had two yeast infections (which are not common in girls her age), and had unexplained redness around her vaginal area.[15] *Cf. id.* at 1063 (referring children for an "*evidentiary* physical examination") (emphasis added). Herrera also had discovered a prior complaint against George in Santa Cruz County alleging that he sexually abused one of his other daughters.[16]

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[15] George told Herrera that the redness around Lacey's vaginal area probably resulted from a medical procedure performed on Lacey on October 26, 1999, in Florida, to test her for a urinary tract infection. When Herrera initially contacted Lacey's pediatrician in Florida, however, the pediatrician denied having performed the procedure. At the time Herrera referred Lacey for a sexual abuse examination, it appears that she therefore had received conflicting information about whether a procedure had in fact been conducted on Lacey and could have caused Lacey's redness. Lacey's pediatrician ultimately remembered that Lacey had undergone a medical procedure on October 26 and that there was no finding of a urinary infection. We are concerned, however, only with what Herrera knew at the time she referred Lacey for the sexual abuse examination.

[16] George argues that the complaints were unsubstantiated and therefore should have been stricken from Herrera's dependency petition. The record indicates, however, that Herrera did not discover that the information was unfounded until December 6, 1999, *after* she already

[13] In sum, we conclude that, even though Herrera made a mistake by referring Lacey for a sexual abuse examination without George's consent or a formal court order, her mistake was a reasonable one under all the circumstances of this case, and she is entitled to qualified immunity with respect to this claim.

II.

The Does also seek to hold the County liable for violating their constitutional rights. The district court concluded that there was no basis for *Monell*[17] liability against the County, and we affirm.

The Does base their *Monell* claim on a statement made by Mary Ritter, the physician's assistant who performed the SART exam on Lacey, regarding her customary practice of performing SART examinations, irregardless of allegations of sexual abuse, on females as young as Lacey with complaints symptomatic of vaginal infections. According to the Does, because Herrera *directed* Ritter to perform the SART examination, she was a county decisionmaker and Ritter's comment alone provided a basis for their *Monell* claim against the County. We disagree.

The Does provide no evidence that Herrera was a final decisionmaker or that she acted with deliberate indifference to the Does' constitutional rights. *See Bd. of County Comm'r v.Brown*, 520 U.S. 397, 404 (1997); *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Christie v. Iopa*, 176 F.3d 1231, 1235-40 (9th Cir. 1999). They also did not present sufficient evidence to show that the County failed adequately to train its social workers or, had the County failed to train, that this failure deliberately caused a deprivation of their constitutional rights. *See City of Canton*, 489 U.S. at 389 (holding that failure to train may serve as the basis for section 1983 liability "[o]nly where [it] reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as

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had referred Lacey for the sexual abuse examination.

[17] *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

defined by our prior case law"). We therefore hold that the district court correctly granted summary judgment against the Does on their *Monell* claim against the County.

CONCLUSION

We affirm the district court's summary judgment in favor of Herrera and the County. In light of our disposition, we need not reach the County's alternative *Rooker-Feldman*[18] argument.

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting in part:

I concur in all of the majority opinion except part I(B)(2), qualified immunity for referring the child for an investigatory examination of her private parts. From that part, I respectfully dissent. I concur in the majority's conclusion that "on the Does' version of the facts, Herrera violated the Does' constitutional rights to family association and procedural due process."[1] This is so, we are agreed, because a social worker needs parental consent or a court order to obtain an investigative medical examination of the child, in the absence of some urgent medical problem requiring immediate attention or a reasonable concern that material physical evidence may otherwise dissipate.[2] The majority bases qualified immunity on its erroneous conclusion that "Herrera reasonably could have believed that she had the requisite court order authorizing the examination."[3]

That conclusion runs contrary to what Herrera herself said.

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[18] *See D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

[1] Maj. Op. at 15741.
[2] *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000).
[3] Maj. Op. at 15742.

Herrera testified in her March 1, 2002 deposition that she "did not" obtain a court order before sending the little girl for an examination of her private parts:

> Q. So you requested a sexual abuse exam of this child?
> A. Yes.
> Q. Did you obtain a court order before you did that?
> A. No, I did not.[4]

Herrera prepared written recommendations for other orders, and the judge at the dependency hearing signed orders dealing with other matters. Herrera never submitted, and the judge never signed, an order for the examination Herrera had forced upon the child. In fact, Herrera did not claim in her declaration, any more than in her deposition, that she thought the judge had ordered an investigatory medical examination. She referred to the judge's actual orders and then, in a separate paragraph, she referred to the judge's remarks, not as an order, but rather as an "inquiry . . . as to whether Lacey Doe was receiving medical treatment for her vaginal infection."[5]

Could a reasonable social worker have believed that she
was carrying out an order for a vaginal examination, even
though this particular social worker did not so believe? The
majority comes up with this on its own; the brief for the social worker and the county does

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[4]E.R. at 319-20.
[5]*Id.* at 49-50.

not make this argument. And the argument seems quite a stretch on the facts of this case. The judge knew how to give orders, and distinguished her orders from her other remarks. Later in the same hearing, the judge said what orders she was making, and did not include an order for an examination. True, the social worker was not there (the agency's lawyer evidently expected her, responding to the judge's inquiry about "treatment . . . for her vaginal infection" by saying, "I did intend to ask the social worker that this morning. She was not here, and I did not get the opportunity to call her . . . .").[6] The majority creates and then indulges a speculation that, told of the judge's inquiry, the social worker could have inferred that she had an order. That speculation is unsupported by any such claim from the social worker or the agency attorney at the hearing or in the brief. Also, between the time of the police report and the examination, this case was brought into court on another issue, so there was plenty of time to obtain judicial approval. Yet it was not sought.

Lacey never did get "treatment . . . for her vaginal infection," which the judge had inquired about. Fortunately, she did not have a vaginal infection — this was misinformation from Betsy Lebbos. In any event, the social worker did not send her to a doctor for treatment. The social worker sent her for a sex abuse examination by a physician's assistant, not for medical treatment by a medical doctor:

Q. What did you make the arrangements for?

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[6] *Id.* at 99.

A. I had a SART exam completed.

Q. So you requested a sexual abuse exam of this child?

A. Yes.[7]

The term "SART" means Sexual Assault Response Team. The physician's assistant's report likewise says that the referral was "for evaluation of concerns of possible child sexual abuse,"[8] not for diagnosis and treatment of a vaginal infection. The very long delay, from November 2, when the child was whisked away from her father with an allegation of vaginal infection, to November 10, when she was presented to the physician's assistant (five days after the judge's expressed concern for the child's health), is plainly inconsistent with any concern by the social worker for her health. The physician's assistant made the little girl display herself in "the supine frog leg position" and "the prone knee-chest position," and she took magnified photographs of the child's private parts. She found no evidence of penetration.[9]

Of course the *Wallis* rule would allow, and common sense would require, that the social worker send the little girl for a medical examination without awaiting a court order if there were an "urgent medical problem," such as to "require[ ] immediate attention."[10] In this case, there is no way that the social worker could be covered by that exception. The social worker did *not* treat Lacey as having an "urgent" problem requiring "immediate" attention. Lacey was not examined until November 10, eight days after the police report indicated an accusation of a vaginal infection, and five days after a judge specifically inquired about it. None of us would wait that long on our own "urgent medical problem[s]"

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[7] *Id.* at 319.
[8] *Id.* at 119.
[9] *Id.* at 119-20.
[10] *Wallis*, 202 F.3d at 1141.

requiring "immediate attention." Lacey's examination plainly did not satisfy this standard from *Wallis*.

Overzealousness by government agents taking children away from their parents can have (and in this case apparently did have) devastating consequences, consequences not ameliorated in the slightest by self-righteous confidence of government agents sure that they are doing good. We do children no good by overindulging government agents who take them away from their families with immunity beyond what the facts and the law justify. As we said in *Calabretta v. Floyd*, "[t]he government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in . . . the lawfully exercised authority of their parents."[11]

Lacey was taken away from her father on the basis of "lack of food, clothing, shelter and medical care inadequate," and an accusation of suspected sexual abuse.[12] These accusations came from Betsy Lebbos. Lebbos's written statement explained what she meant by lack of food: when she got fast food on the way home from shopping, "Lacey did not eat her hamburger or any food"; the next morning she refused to eat her cereal; her father said she would not eat fruits and vegetables.[13] The concern for lack of clothes was that Lacey arrived from Miami with only summer clothes, and Betsy Lebbos disapproved of her father's letting his child sleep in the same pair of pajamas every night.[14] The October 31 incident that triggered Lebbos's call to the state and all the subsequent events of this case was that Lebbos "purchased Lacey a beautiful $15.00 princess dress," yet her father took her from Lebbos's house and did not put her in her princess dress for Halloween.[15] According to the social-service intake form, Lebbos then held Lacey's father's things

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[11] *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).
[12] E.R. at 58.
[13] *Id.* at 213.
[14] *Id.* ("To make your daughter sleep in the same pair of pajamas every night is neglect.").
[15] *Id.* at 217.

hostage to get custody of the little girl: "As per officer, Betsy Lebbos has appeared irate and irrational, saying she wouldn't give dad his clothes unless he gave child to her. Officer is concerned that Betsy Lebbos is attempting to gain custody of child."[16]

The agency screener characterized this supposedly neglected child, a few hours after being whisked away, as "friendly and cooperative . . . . She appeared to enjoy watching cartoons and playing with toys, exhibited curiosity about her surrounding. She displayed no anxiety to be among strangers and ate a sandwich, chips and cookies hungrily."[17] Those who took Lacey away left behind her glasses. Her father brought them to court and asked that they be delivered to her. The bureaucracy, it appears, focused on her genitals, not on her eyes, despite her obvious ambiyopia. The physician's assistant who did the sex abuse examination and photography likewise characterized Lacey upon arrival at her office as a "pleasant, cooperative preschool female in no acute distress," normal in height, weight, and other respects.[18]

After being bounced around in the agency and foster-parent bureaucracy for over a year, Lacey was quite a different little girl. She was "diagnosed with Post-Traumatic Stress Disorder, hearing voices, and suicidal ideation."[19] She was put on anti-psychotic medication. She had taken to smearing feces and to other abnormal and highly disruptive behavior. Though Lacey had somehow held her personality together through her mother's death, her father's lack of financial success, and the move back to California, what the county did to her to "protect" her apparently destroyed her. Something in this experience, perhaps being ripped away from her father for whom she consistently expressed love during the whole miserable period, perhaps having strangers strip her and search her heretofore private parts, perhaps

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[16] *Id.* at 207.
[17] *Id.* at 227-28.
[18] *Id. at 120.*
[19] *Id.* at 107.

being put with caretakers instead of her father, amounted to a trauma that was too much for her.

On these facts, the majority grants Herrera qualified immunity; it calls what she did a "reasonable" mistake. Instead, we should remember Justice Brandeis's warning and remand this case for trial: Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[20]

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[20] *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE DOE, individually and as Guardian Ad Litem; LACEY DOE, a minor, Plaintiffs-Appellants, v. BETSEY WARREN LEBBOS; LISVET CARILO-HERRERA; AIDA MADELINE LEBBOS; AIDA LEBBOS TRUST; COUNTY OF SANTA CLARA; SANTA CLARA COUNTY DEPARTMENT OF SOCIAL SERVICES; SANTA CLARA CHILD PROTECTIVE SERVICES, Defendants-Appellees.	No. 02-16326 D.C. No. CV-00-21274-RMW/PVT Northern District of California, San Jose ORDER

Before: RYMER, KLEINFELD, and PAEZ, Circuit Judges.

A majority of the panel has voted to deny Appellant George Doe's petition for rehearing and petition for rehearing en banc. Judge Kleinfeld voted to grant the petition for rehearing and petition for rehearing en banc.

The panel has voted to deny Appellee Betsy Lebbos' petition for rehearing and petition for suggestion of rehearing en banc and request for published apology.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

Therefore, the petitions for rehearing and petitions for rehearing en banc are DENIED.

STATUTES INVOLVED

U.S. Constitution – 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution - 14th Amendment, Section 1 Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

APPENDIX F

[Fourth District California Assemblyman David Knowles Letterhead]

AUTHOR'S STATEMENT

REGARDING AB 1355

ABSOLUTE CIVIL IMMUNITY OF SOCIAL WORKERS

Recent Federal court decisions have extended to social workers an absolute immunity from civil liability from actions brought pursuant to the 1971 Civil Rights Act (42 U.S.C. 1983).

In Myers vs. Contra Costa County Dept. of Social Services 812 F.2d 1154 (9th Cir.), Cert. Denied. 108S.Ct. 98 (1987), the Court held that ". . . social workers are entitled to absolute immunity in performing quasi-prosecutorial functions. . . " (Id. at 1157). The Myers court found the functions of social workers to be like those of criminal prosecutors and thus,

> . . . SUCH ABSOLUTE IMMUNITY FROM LIABILITY WAS APPLICABLE EVEN WHERE THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY, DELIBERATELY WITHHELD EXCULPATORY INFORMATION, OR FAILED TO MAKE FULL DISCLOSURE OF

ALL FACTS CASTING DOUBT UPON THE STATE'S TESTIMONY. (Id. citing Imbler v. Pachtman, 424 U.S. 409, 424-26)

The U.S. Supreme Court in February, 1989 declared, in the case of Deshaney v. Winnebago County Dept. of Social Services (89 Daily Journal D.A.R. 2180), "we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause (Id. 2180) of the Fourteenth Amendment. Thus, the Supreme Court denied relief in civil rights suits brought in federal court even where, as in the Deshaney case, the county social workers knew and ". . . observed a number of suspicious injuries. . ." (Id. 2181), and documented other instances of life threatening abuse which, tragically, ultimately resulted in permanent brain damage to four year old Joshua Deshaney.

Consequently, the decisions in Myers and Deshaney have created a situation in which social workers are absolutely immune from civil rights actions for either their acts or omissions. Thus, SOCIAL WORKERS HAVE MORE CIVIL LIABILITY THAN POLICE OFFICERS.

The California legislature can and should limit the absolute civil immunity of social workes. In Deshaney the U.S. Supreme Court acknowledged that "a State may, through its courts and legislatures, impose such affirmative duties of care and protection as it wishes." (Supra, at 2183). Similarly, other federal appellate courts have rejected the analysis of the Myers Court. In Robison v. Via 821 F.2d 913 (2nd Cir. 1987)

> [W]e think the strong emotional response provoked in anyone hearing an allegation of child abuse counsels against according an

> official absolute immunity for a taking in the wake of any and every such allegation, lest the official power itself become more likely to be abused. Nor could we rule that absolute immunity for taking the child is appropriate when done in response to a complaint that is credible or in circumstances that bespeak emergency, for the very introduction of such circumstantial qualifiers leads us out of the realm of absolute immunity, in which evaluation of motive and reasonableness is forbidden, and into the realm of qualified immunity;.

Clearly a grant of absolute civil immunity is not necessary to the function of social workers. It most certainly is not desireable.

Furthermore, the comparison utilized by the Myers court is patently false and inevitably dangerous. For example, consider the following:

> (1) UNLIKE prosecutors the activities of social workers are not subjected to deliberation and wisdom of trial by jury.
>
> (2) UNLIKE prosecutors the activities of social workers are not subject to public scrutiny and political process – ie. juvenile court is a secret proceeding and social workers are not elected.
>
> (3) UNLIKE prosecutors many social workers lack specialized training and/or degrees.

(4) UNLIKE prosecutors social workers are not answerable to the negative sanctions of a peer review process – such as the Bar Association.

(5) UNLIKE prosecutors social workers are not sworn to uphold the Constitutions and the laws of the United States and the State of California.

(6) UNLIKE prosecutors social workers are not required to establish guilt beyond a reasonable doubt.

Social workers now have a civil immunity which surpasses the civil immunity of anyone else in our nation; even presidents, legislators and prosecutors are accountable to the political process and the consent of the governed. Currently there does not exist any effective check upon the arbitrary power or absolute immunity of social workers. Such a situation is anti-thetical to the American political philosophy and history of a system of accountable government power.

[SEAL OF STATE OF CALIFORNIA
HERE IN ORIGINAL]

GOVERNOR'S OFFICE

October 16, 1995

To the Members of the California Assembly:

I have today signed Assembly Bill No. 1355.

This bill would provide that the civil immunity of juvenile court social workers, child protection workers and other public employees authorized to initiate or conduct investigations or proceedings pursuant to the juvenile court law shall not extend to acts of perjury, fabrication of evidence or obtaining testimony by duress fraud or undue influence if any of these acts are committed by malice.

Social Workers practicing in the child dependency area are burdened with the extraordinary task of deciding when to set into motion the procedures for removing children from homes in which they may be endangered. Statutory provisions and the courts have conferred upon them extraordinary authority and absolute immunity from civil liability for any abuse of their authority.

There is good reason for those charged with protecting the most vulnerable of Californians to be armed with exceptional powers. Nonetheless shielding public employees from liability when they have engaged in malice and egregiously false and wrongful conduct cannot be justified.

Several recent cases have graphically illustrated that some social workers abuse their absolute immunity in ways that subject children to harm much greater than any that existed in their homes. AB 1355 seeks to preserve the ability

of social workers to perform their duties to protect children with honest zeal, but not malice that destroys innocent reputations, and destroys families.

The child protection system is designed to protect children from abusive parents, but who protects children from the abuse of the system? Just last month the California Court of Appeal, Fourth Appellate District in *Steers v. Young* 95 Daily Journal DAR 12547 urged that the application of absolute immunity in the child abuse cases receive the earnest reexamination of the legislature.

This bill, like most, is less than perfect but injects into a troubled system a degree of accountability that will continue to protect child protection workers from all but malicious acts. It will give the zealous and honest child protectors essentially the same qualified immunity that protects police officers in the honest performance of their duties.

The bill would be improved by a pleading hurdle requiring a preliminary showing of probability that the plaintiff will prevail. In the absence of such a pleading hurdle, I would hope that conscientious juvenile court judges will compel the attendance of the social worker and test the evidence where it seems appropriate, consistent with needed confidentiality, rather than relying exclusively upon the written record. Also, the bill on its face has exclusive application to juvenile court social workers and child protection workers, and does not apply to judges or prosecutors or their employees acting at their direction and within the scope of their authority.

The fact that the bill might not have been improved by an explicit statement to that effect, as well as by the inclusion of a pleading hurdle, is not sufficient reason to withhold my signature from a needed reform.

Cordially,

/s/
PETE WILSON